

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

DAVID STALHEIM, DAN McSHANE, ERIC
HIRST, WENDY HARRIS, TODD DONOVAN,
SUE BROWN, JOHN AND KAREN STEENSMA,
LAURA LEIGH BRAKKE, DEAN MARTIN, AND
FUTUREWISE,

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

And,

CITY OF FERNDAL and ANCHOR MANOR,
LLC,

Intervenors.

CASE NO. 10-2-0016c

FINAL DECISION AND ORDER

I. SYNOPSIS

In this Order, the Board finds Whatcom County Ordinance 2010-037 compliant with the Growth Management Act, except in the following areas:

- In sizing the Ferndale UGA, the County improperly relied both on a market supply factor and "local circumstances". As the market supply factor already includes and accounts for "local circumstances", the County thereby over-estimated its residential lands needs and over-sized the Ferndale UGA.

- Approving the Ferndale UGA in the absence of adopted fire and sewer plans demonstrates Whatcom County's failure to be guided by RCW 36.70A.020(1) and (12).
- In the absence of capital facilities plans for fire and wastewater, it cannot be said that the Ferndale UGA has "adequate existing public facility and service capacities to serve such development" and the Board finds this to be a violation of RCW 36.70A.110(3).
- By approving the Ferndale UGA without current fire and wastewater capital facilities in place the County created an inconsistency between its UGA Reserve Criteria (Adequate Public Facilities and Services) and its Comprehensive Plan map, in violation of RCW 36.70A.070 (preamble).
- In approving the Ferndale UGA expansion in the absence of adequate capital facilities plans for fire and wastewater, the County violated RCW 36.70A.070(3).
- The Board does not by this Order impose invalidity on the non-compliant provisions of Ordinance 2010-037.

II. PROCEDURAL BACKGROUND

Petitions for Review

On October 8, 2010 Petitioner Futurewise filed a Petition for Review (PFR) with the Board.¹ This was followed with a PFR filed by Petitioner Dean Martin on October 12, 2010² and a PFR filed by Petitioners David Stalheim et al. on October 13, 2010.³ As authorized by RCW 36.70A.290(5), the Board consolidated these matters into the present case – Case 10-2-0016c.⁴ With these PFRs, Petitioners challenge Whatcom County's adoption of Ordinance No. 2010-037 which amended the County's Comprehensive Plan to extend the Ferndale and Birch Bay Urban Growth Areas (UGAs).

¹ This PFR was assigned Case No. 10-2-0014.

² This PFR was assigned Case No. 10-2-0015.

³ This PFR was assigned Case No. 10-2-0016.

⁴ Order on Consolidation, October 15, 2011.

1 **Motions**

2 On November 22, 2010, the Board granted intervention to the City of Ferndale and on
3 January 4, 2011, the Board granted intervention to Anchor Manor LLC.

4
5 On January 4, 2011, the Board granted Petitioners' motion to supplement the record with
6 the "public participation plan" from the May 2010 Whatcom County Comprehensive Plan.

7
8 On January 7, 2011, in response to a motion brought by Whatcom County and the City of
9 Ferndale, the Board dismissed Martin Issues 4 and 5 and dismissed Stalheim et al. Issue 5
10 to the extent that this issue seeks to challenge the consistency between the comprehensive
11 plan amendments and WCC 2.160.080 and development regulations. However, on motion
12 for reconsideration the Board amended its earlier order and reinstituted Martin Issue 5. The
13 Board also dismissed portions of Stalheim et al.' s Issues 7 and 8 raising a challenge under
14 RCW 36.70A.060.⁵

15
16 On January 21, 2011, the Board denied Petitioner Stalheim et al.'s motion for an over-length
17 brief but modified the briefing schedule to accommodate re-submittal of the brief in a form
18 that complied with the Prehearing Order.

19
20 By letter of February 26, 2011, Stalheim objected to those portions of the County and
21 Intervenors' briefs that referenced exhibits offered in a motion to supplement, but not
22 admitted. The Board did not consider such exhibits in reaching its decision, nor argument
23 based on excluded evidence.

24
25 On February 28, 2011, the County and Intervenors filed a motion to strike Petitioners
26 Stalheim's and Martin's Late reply brief as well as "additional appendix to Petitioners' Brief
27 demonstrating Ferndale's annexation history" (Appendix) attached to a February 25, 2011
28 e-mail. Petitioners' reply brief was due by February 25. This brief was filed in a timely
29 manner, but followed by a revised version filed after business hours on February 25 and
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⁵ Order on Dispositive Motions, January 7, 2011; Order on Motion for Reconsideration, February 4, 2011.

1 thus not reasonably available to the other parties until February 28. The Board had
2 rescheduled the HOM from February 28 to March 3 in order to accommodate the briefing
3 schedule and allow the parties to have adequate time to review the reply brief prior to the
4 HOM. Allowing a late brief would defeat this purpose. Given that Petitioners were able to
5 file a version of a reply brief, the late version of the brief will not be considered. As to the
6 Appendix concerning the Ferndale annexation history, Petitioners did not bring a motion to
7 supplement the record nor to take official notice of this information. Further, no documents
8 were submitted to the Board, but rather Petitioners submitted internet links with no effort to
9 suggest how the information at these links support their argument. This Appendix was
10 submitted in time to be considered part of the Petitioners' reply brief and will be allowed as
11 such, but as no other documents were attached, the material to which these links are
12 connected will not be considered.
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15 **Hearing on the Merits**

16 The Hearing on the Merits was held on February 27, 2011, in Bellingham, Washington.
17 Board members William Roehl and Nina Carter, were present; Board Member James
18 McNamara presiding. Petitioner Futurewise was represented by Tim Trohimovich and Jill
19 Smith; Petitioners Stalheim, et al. were represented by Barbara Dykes; Petitioner Martin
20 was represented by Tom Ehrlichman; Whatcom County was represented by Karen Frakes;
21 Intervenor City of Ferndale was represented by Dannon Traxler; Intervenor Anchor Manor
22 LLC, was represented by Jack Swanson .
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25 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, 26 AND STANDARD OF REVIEW**

27 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and
28 amendments to them, are presumed valid upon adoption.⁶ This presumption creates a high
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32 ⁶ RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable
development regulations] comprehensive plans and development regulations, and amendments thereto,
adopted under this chapter are presumed valid upon adoption.

1 threshold for challengers as the burden is on the petitioners to demonstrate that any action
2 taken by Whatcom County is not in compliance with the GMA.⁷

3
4 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating
5 noncompliant plans and development regulations.⁸ The scope of the Board's review is
6 limited to determining whether Whatcom County has achieved compliance with the GMA
7 only with respect to those issues presented in a timely petition for review.⁹ The GMA directs
8 that the Board, after full consideration of the petition, shall determine whether there is
9 compliance with the requirements of the GMA.¹⁰ The Board shall find compliance unless it
10 determines that Whatcom County's action is clearly erroneous in view of the entire record
11 before the Board and in light of the goals and requirements of the GMA.¹¹ In order to find
12 Whatcom County's action clearly erroneous, the Board must be "left with the firm and
13 definite conviction that a mistake has been committed."¹²
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16 In reviewing the planning decisions of cities and counties, the Board is instructed to
17 recognize "the broad range of discretion that may be exercised by counties and cities" and
18 to "grant deference to counties and cities in how they plan for growth."¹³ However,
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21 ⁷ RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the
22 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
23 chapter is not in compliance with the requirements of this chapter.

24 ⁸ RCW 36.70A.280, RCW 36.70A.302

25 ⁹ RCW 36.70A.290(1)

26 ¹⁰ RCW 36.70A.320(3)

27 ¹¹ RCW 36.70A.320(3)

28 ¹² *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v.*
PUD District No. 1 of Jefferson County, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe,*
et al v. WWGMHB, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d
488, 497-98, 139 P.3d 1096 (2006).

29 ¹³ RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be
30 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the
31 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements
32 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities
to balance priorities and options for action in full consideration of local circumstances. The legislature finds that
while this chapter requires local planning to take place within a framework of state goals and requirements, the
ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and
implementing a county's or city's future rests with that community.

1 Whatcom County's actions are not boundless; their actions must be consistent with the
2 goals and requirements of the GMA.¹⁴

3
4 Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate
5 that the challenged action taken by Whatcom County is clearly erroneous in light of the
6 goals and requirements of the GMA.
7

8 IV. BOARD JURISDICTION

9 The Board finds the Petitions for Review were timely filed, pursuant to RCW 36.70A.290(2).
10 The Board finds Petitioners have standing to appear before the Board, pursuant to RCW
11 36.70A.280(2). The Board finds it has jurisdiction over the subject matter of the petitions
12 pursuant to RCW 36.70A.280(1).¹⁵
13

14 V. PRELIMINARY MATTERS

15
16 At the Hearing on the Merits, the County objected to Stalheim's illustrative exhibits because
17 they were not provided until March 2, rather than March 1 as required. Petitioners indicated
18 that this was due to an e-mail issue on the County's end. The Board allowed the illustrative
19 exhibits, but provided the County with one week to object to the content of those exhibits.
20 No objection was received.
21

22 Following the HOM, Intervenor City of Ferndale requested that the Board take official notice
23 of the March 7, 2011, adoption of Ferndale's 2011 Comprehensive Sewer Plan.¹⁶ Ferndale
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28 ¹⁴ *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the
29 goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the
30 degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The
31 amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give
32 the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and
capricious standard. *Id.* at 435, Fn.8.

¹⁵ Except as concluded in the January 4 Order on Dispositive Motions

¹⁶ Intervenor Ferndale's Request for Official Notice and Motion to Dismiss, filed March 10, 2011.

1 also moved to dismiss all issues pertaining to the adequacy of its sewer capital facilities
2 planning asserting adoption of this plan rendered such issues moot.¹⁷

3
4 Pursuant to Board rule, WAC 242-03-800, no post hearing evidence, documents, briefs, or
5 motions will be accepted unless specifically requested or authorized by the Board. Further,
6 RCW 36.70A.290(4) provides that the Board shall base its decision on the record developed
7 by the County. The “record” consists of material used in taking the action which is the
8 subject of the petitions for review, not material created or adopted after the fact. This is
9 important because the Board determines if the action by the County was clearly erroneous
10 based on the record that was available to the County *at the time of adoption of the*
11 *ordinance under appeal*. If the County takes remedial action subsequent to the appeal, the
12 adequacy of that action is a matter to be considered in compliance proceedings, subject to
13 briefing by all parties and hearing by the Board. Ferndale’s request for official notice and
14 motion to dismiss is denied.
15
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17 VI. ISSUES AND DISCUSSION

18 The Challenged Action

19
20 Petitioners challenge Whatcom County’s adoption of Ordinance 2010-037 which amended
21 the Urban Growth Area (UGA) for the City of Ferndale and for the unincorporated area of
22 Birch Bay.¹⁸ However, these amendments are not merely stand-alone actions, but
23 represent the continuation of Whatcom County’s efforts to comply with the GMA’s mandate
24 that it review its UGAs every 10 years so as to accommodate growth projected to occur in
25 the succeeding 20 year period.¹⁹ The County’s “UGA Update” began sometime in 2006
26 after the Board established that the County’s deadline for conducting this review was 2007;
27 the process effectively continued until 2009.²⁰ In 2009, the County adopted Ordinance
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30 ¹⁷ *Id.*

31 ¹⁸ Exhibit C-380

32 ¹⁹ RCW 36.70A.130(3)

²⁰ See *Wiesen v. Whatcom County*, Case 06-2-0008, Order on Motions (July 18, 2006); *Wiesen v. Whatcom County*, Case 07-2-0009, Order on Motions (Aug. 27, 2007); *Petree et al. v. Whatcom County*, Case 08-2-

1 2009-071²¹ for which the Board concluded the County had satisfied the deadline required by
2 the GMA for its UGA Update.²²

3
4 However, the adoption of Ordinance 2009-071 resulted in the filing of nine Petitions for
5 Review (PFRs) to the Board alleging various substantive violations of the GMA, including
6 the sizing of UGAs and agricultural lands of long-term commercial significance.²³ The
7 consolidated case that resulted from those PFRs has been extended several times to
8 accommodate settlement discussions between the parties and Whatcom County.²⁴ The
9 adoption of Ordinance 2010-037 is one of the direct results of those settlement discussions.
10

11 With Ordinance 2010-037, Whatcom County amended the UGA Boundaries for both the
12 City of Ferndale²⁵ and the unincorporated area of Birch Bay that it had previously adopted
13 via Ordinance 2009-071, with both UGAs being expanded. The resulting amendments are
14 reflected in both the text of the Comprehensive Plan as well as its maps.²⁶ In taking this
15 action, the County Council incorporated by reference the Findings of Fact and Conclusions
16 of Law entered in support of Ordinance 2009-071, except as amended by Ordinance 2010-
17 037²⁷. Ordinance 2010-037, at Finding Nos. 13 to 29 expressly addresses the Birch Bay
18 UGA and, at Finding Nos. 30 to 57, it expressly addresses the Ferndale UGA.
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21 Petitioners' issues set forth a variety of impact-related claims based on the expansion of
22 these UGAs, such as the adequacy of public facilities and services and resource lands, as
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25 0021c, Order finding Non-Compliance (July 2, 2008). All of these cases essentially asserted a "failure to act"
26 on the part of Whatcom County in meeting the 10-year deadline for UGA update.

27 ²¹ Exhibit C-259

²² *Petree, et al. v. Whatcom County*, Case 08-2-0021c, Order of Dismissal (Feb. 23, 2010).

²³ These petitions were consolidated under *Caitac, et al. v. Whatcom County*, Case 10-2-0009c.

²⁴ The most recent extension occurred in March 2011 – see Fifth Order Granting Extension (March 7, 2011).

²⁵ The City of Ferndale's UGA is comprised both of land within the municipal boundaries and land within the
28 unincorporated area of Whatcom County. For the purpose of these proceedings, reference to this UGA
29 includes all of these lands.

²⁶ Land Use Element, Chapter 2; Map UGA-4 Ferndale UGA; Map UGA-8 Birch Bay UGA; Map 8
30 Comprehensive Plan Designations.

²⁷ The Board reminds the parties that Ordinance 2009-071, in and of itself, is not under challenge in these
31 proceedings. It is the un-amended Findings and/or Conclusions that Whatcom County has incorporated by
32 reference into Ordinance 2010-037 that are subject to the Board's review.

1 well as issues related to public participation, SEPA environmental review, and inter-
2 jurisdictional coordination.

3
4 **A. UGA Sizing**

5 **Futurewise Issue 1, Martin Issue 3 and Stalheim Issue 2 will be considered together**

6 **Futurewise Issue 1:** Do Sections 1 and 2 of Ordinance No. 2010-037 and the referenced
7 amendments violate RCW 36.70A.110(2), RCW 36.70A.115, and Washington state
8 Supreme Court case law by adopting two urban growth areas that are larger than needed
9 to accommodate the County's population and employment projections?

10 **Martin Issue 3:** Did the County adoption of the comprehensive plan amendment and
11 development regulations fail to comply with RCW 36.70A.110 by allowing excess land
12 supply beyond what is required to accommodate allocated growth?

13 **Stalheim Issue 2:** Did the County's amendment of the official zoning map and the
14 comprehensive plan text and map in Ord. No. 2010-037 fail to comply with RCW
15 36.70A.110(2) because the County expanded the Ferndale and Birch Bay UGAs but failed
16 to "show its work" and allowed excess land supply beyond what is necessary to
17 accommodate the allocated twenty-year growth targets?

18 *Applicable Law*

19 RCW 36.70A.110(2) provides, in pertinent part:

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21 (2) Based upon the growth management population projection made for
22 the county by the office of financial management, the county and each city
23 within the county shall include areas and densities sufficient to permit the
24 urban growth that is projected to occur in the county or city for the
25 succeeding twenty-year period, except for those urban growth areas
26 contained totally within a national historical reserve. As part of this
27 planning process, each city within the county must include areas sufficient
28 to accommodate the broad range of needs and uses that will accompany
29 the projected urban growth including, as appropriate, medical,
30 governmental, institutional, commercial, service, retail, and other
31 nonresidential uses.

32 Each urban growth area shall permit urban densities and shall include
greenbelt and open space areas. In the case of urban growth areas
contained totally within a national historical reserve, the city may restrict
densities, intensities, and forms of urban growth as determined to be

1 necessary and appropriate to protect the physical, cultural, or historic
2 integrity of the reserve. An urban growth area determination may include a
3 reasonable land market supply factor and shall permit a range of urban
4 densities and uses. In determining this market factor, cities and counties
5 may consider local circumstances. Cities and counties have discretion in
6 their comprehensive plans to make many choices about accommodating
7 growth.

8 RCW 36.70A.115 provides:

9 Counties and cities that are required or choose to plan under RCW 36.70A.040
10 shall ensure that, taken collectively, adoption of and amendments to their
11 comprehensive plans and/or development regulations provide sufficient capacity
12 of land suitable for development within their jurisdictions to accommodate their
13 allocated housing and employment growth, including the accommodation of, as
14 appropriate, the medical, governmental, educational, institutional, commercial,
15 and industrial facilities related to such growth, as adopted in the applicable
16 countywide planning policies and consistent with the twenty-year population
17 forecast from the office of financial management.

18 Board Analysis and Findings

19 Futurewise argues that by increasing the Ferndale UGA by 476 acres and the Birch Bay
20 UGA by 17 acres, the County failed to comply with RCW 36.70A.110(2), 36.70A.115, and
21 applicable case law because both UGAs are larger than needed to accommodate their
22 adopted population and employment projections.²⁸

23 Futurewise notes that after deducting for land devoted to public uses (266 acres, plus 39
24 acres of “other public uses”), critical areas (245 acres), infrastructure (162 acres) and a
25 market factor of 17.3%, there are 475 net developable residential acres in the Birch Bay
26 UGA. Based on the County’s Revised Land Capacity Analysis,²⁹ Futurewise argues that
27 residential capacity in the Birch Bay UGA exceeds the adopted population projection by 78
28 people and the needed land by 10 acres. With regard to commercial and industrial lands,
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32 ²⁸ Futurewise Opening Brief at 4.

²⁹ IR C-349 at 19.

1 Futurewise cites the County's Revised Land Capacity Analysis which shows a surplus of 69
2 acres of land.³⁰

3
4 As to the Ferndale UGA, Futurewise again cites the County's Revised Land Capacity
5 Analysis which, as to this UGA, shows that there is a 214 acre surplus of residential land³¹
6 and a 9 acre surplus of commercial/industrial land.³²

7
8 Futurewise argues that this oversupply of land substantially interferes with the urban growth
9 goal of RCW 36.70A.020(1) since it urbanizes lands that should be rural or resource lands;
10 that it interferes with .020(2) since urban development sprawls onto rural areas; that it
11 interferes with .020(9) because it does not retain open space; and that it interferes with
12 .020(10) by not protecting the environment.³³

13
14 Stalheim argues that if Ferndale were allocated the same rate of growth (8.0%) that it
15 experienced from 1990-2008, the allocation to the Ferndale UGA would be 4,450 people, a
16 reduction of 4,148 from the allocation of 8,688 net growth in Ord. 2010-037.³⁴ Stalheim
17 further argues that in resizing the UGAs the County allowed for an excess land supply
18 beyond what is necessary to allocate the 20 year projected population, and that the
19 additional county-wide allocation of 1,153 could have easily been accommodated without
20 amendment of the UGA boundaries.³⁵ Stalheim notes that the County Staff Report states
21 that the Ferndale UGA was oversized by 214 net developable acres, in which 2,566 or 21%
22 of the City's 2008 population could be accommodated.³⁶ Finally, Stalheim argues that in
23 sizing the UGAs, the County failed to "show its work".³⁷
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29 ³⁰ IR C-349 at 20.

30 ³¹ IR C-349 at 21.

31 ³² IR C-349 at 22.

32 ³³ Futurewise Opening Brief at 11.

33 ³⁴ Stalheim Opening Brief at 8.

34 ³⁵ Stalheim Opening Brief at 9.

35 ³⁶ Id.

36 ³⁷ Stalheim Opening Brief at 12.

1 On this issue, Martin incorporates by reference the briefing Stalheim submitted on his Issue
2 2.³⁸

3
4 In response, the County first argues that Stalheim is making arguments regarding the
5 revised population allocation in Ordinance 2010-037 that go beyond the issue statement.³⁹
6 The Board finds that Stalheim's Issue 2 did not, in fact, challenge this aspect of Ordinance
7 2010-037 and such a challenge is untimely and will not be considered.
8

9 Next the County argues that Futurewise attempts to challenge the Birch Bay UGA
10 commercial/industrial land capacity as being excessive, even though Ordinance 2010-037
11 did not amend the Birch Bay UGA in this regard. Thus, the County argues that this
12 challenge is untimely.⁴⁰ In response, Futurewise asserts that the County could have
13 avoided the need to expand this UGA by re-designating some of its commercial land for
14 residential use and because the Birch Bay UGA was amended Futurewise can challenge it
15 on any grounds.⁴¹ The Board finds that Futurewise's argument is an overly expansive
16 reading of its ability to challenge the County's actions. Ordinance 2010-037 did not amend
17 this aspect of Ordinance 2009-071, which implemented the County's 10 year review. The
18 Board finds Futurewise's challenge in this regard to be untimely.
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21 Moving to the broader question of the appropriate size of a UGA, the County notes the
22 competing concerns that must be addressed in sizing a UGA - if the UGA is too large it
23 encourages sprawl, yet if it too small this can drive up land prices and force development
24 away from urban areas, in contravention of GMA's goals to encourage compact urban
25 growth. The County offers that the UGA sizing process is not an exact science and requires
26 that assumptions be made regarding future development patterns. Because of this, and
27 because the calculations of land capacity do not always conform perfectly with existing local
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31 ³⁸ Martin's Opening Brief at 20.

32 ³⁹ County Brief at 10.

⁴⁰ County Brief at 11.

⁴¹ Futurewise Reply Brief at 9.

1 circumstances, the Legislature has granted local governments discretion in making such
2 decisions:

3 “Cities and counties have discretion in their comprehensive plans to make many
4 choices about accommodating growth.” RCW 36.70A.110(2)

5
6 The County offers that in the case of the Ferndale UGA, the reason for the 214 acres
7 surplus residential land was explained in Finding 51:

8 The Vista Malloy area, which was removed from the UGA by ordinance 2009 –
9 071, is critical for the city's long-range planning and as a transportation and
10 utility corridor. The area is also directly south of employment centers along
11 Grandview Road and directly north of planned school facilities which are
12 intended to serve a larger population. Placing this area back in the UGA would
13 make a more logical urban growth boundary. The area was designated as an
14 urban growth area in 1997 and the city has initiated necessary public facility
15 and capital improvements for the area. Without reasonable assurance of future
16 land use designation in this area, the city has expressed concern about
17 committing financial resources to plan public facilities and services for this
18 area.

19 The County argues that Ferndale’s commercial/industrial land capacity, over the course of
20 the 20 year planning period, shows a surplus of only 9 acres and 79 employees, which the
21 County argues is *de minimis*.⁴²

22 The City of Ferndale argues that the size of Ferndale’s UGA can be justified by the City’s
23 unique local circumstances, and that the surplus was needed to reasonably accommodate
24 Ferndale’s future growth. Among these local circumstances, Ferndale points to the fact that
25 it is the gateway to industrial uses just outside the City such as the Lummi Reservation,
26 Intalco, a proposed shipping facility/deep water port at Cherry Point, and expansion of a
27 refinery at Cherry Point.⁴³ Further, Ferndale argues that a county is required to justify its
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⁴² County Brief at 13.

⁴³ Ferndale Brief at 12.

1 UGA designations only if it fails to reach an agreement with a city, and that here, an
2 agreement was reached.⁴⁴

3
4 As to the Birch Bay UGA, the County points out that the residential land capacity analysis
5 showed a surplus of 10 acres (or 78 people) and that this is insignificant in light of the lack
6 of mathematical precision in the UGA sizing process.⁴⁵

7
8 Anchor Manor argues too that the surplus in the Birch Bay UGA is minor and that the
9 County can't be expected to make its UGAs exactly equal to the population growth
10 projection.⁴⁶ It notes the practical difficulties in UGA layout, including the fact that parcel
11 sizes are not adjustable and it is almost impossible for a county to create the right
12 combination of parcel sizes to accommodate the exact allocated population for a specific
13 UGA.⁴⁷

14
15 As noted above, RCW 36.70A.110(2) provides that in sizing a UGA, the county and each
16 city within the county shall include areas and densities sufficient to permit the urban growth
17 that is projected to occur in the county or city for the succeeding twenty-year period and this
18 shall be based upon the growth management population projection made for the county by
19 the Office of Financial Management. Further, our State Supreme Court has held that "a
20 UGA designation cannot exceed the amount of land necessary to accommodate the urban
21 growth projected by OFM, plus a reasonable land market supply factor."⁴⁸ The point of
22 divergence between Petitioners and the County and Intervenor, it appears, is the extent to
23 which the County, in engaging in UGA sizing may consider "local circumstances".
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31 ⁴⁴ Ferndale Brief at 5.

⁴⁵ County Brief at 14.

⁴⁶ Anchor Manor Brief at 7.

⁴⁷ Anchor Manor Brief at 8.

⁴⁸ Thurston County v. WWGMHB, 164 Wn.2d 329, 352 (2008).

1 The County says quite directly “In the present case, the difference is due to these judicially
2 recognized ‘local circumstances’.”⁴⁹ Intervenor Ferndale too argues that the re-inclusion of
3 land into the Ferndale UGA was “based on considerations of Ferndale’s unique, localized
4 circumstances.”⁵⁰ The County’s error in this regard is not that it cannot rely on “local
5 circumstances” but that it failed to recognize that by employing the use of a market supply
6 factor in its land capacity analysis it has already accounted for local circumstances.
7

8 *Thurston County* cannot be read to allow the “double counting” that would result from sizing
9 a UGA based upon considerations of both a market supply factor and “local circumstances”.
10 In *Thurston County*, the State Supreme Court noted that a market factor represents the
11 estimated percentage of net developable acres contained within a UGA that, due to
12 idiosyncratic market forces, is likely to remain undeveloped over the course of the twenty-
13 year planning cycle.⁵¹ That a county may not rely upon *both* a market supply factor and
14 “local circumstances” can be seen in the Court’s discussion of how a Growth Management
15 Hearings Board should scrutinize the use of the market supply factor. First, the Court held
16 that:
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19 [I]n determining whether a market supply factor is reasonable, a board must
20 recognize counties have great discretion in making choices about
21 accommodating growth and the land market supply factor may be based on
22 local circumstances.⁵²

23 The Court continued:

24 If the Board finds that a land market supply factor was not used, the Board
25 must determine whether the UGA designations were clearly erroneous after
26 taking into account local circumstances and deferring to the County’s
27 discretion in making choices to accommodate future growth.⁵³
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30 ⁴⁹ County Brief at 13.

31 ⁵⁰ Ferndale Brief at 4.

32 ⁵¹ *Thurston County v. WWGMHB*, 164 Wn.2d 329, 352 (2008).

⁵² *Id.* at 353.

⁵³ *Id.*

1 Thus, it is clear that where, as here, the County has chosen to use a market supply factor in
2 its analysis, by so doing it has thereby considered local circumstances. It may not add
3 additional land beyond what that analysis suggests, in the interests of other local
4 circumstances.

5
6 It is apparent from the record that the County oversized the Ferndale UGA. In the County's
7 residential land capacity analysis for the Ferndale UGA⁵⁴ the County made deductions for
8 public uses, infrastructure, critical areas, and a market supply factor – 20.2% within the city
9 limits and 22.2% within the unincorporated areas of the UGA. The County's analysis
10 showed a supply of 830 net developable acres of residential land and a demand for 615 net
11 developable acres. Thus, there is a surplus of 214 acres, or 35 percent more than is
12 required.

13
14
15 In adding this additional land after already taking into consideration the "local
16 circumstances" accounted for by its market supply factor, the County oversized the Ferndale
17 UGA. This was clearly erroneous and in violation of RCW 36.70A.110(2).

18
19 The Board does not find this logic compels a similar conclusion for the Birch Bay UGA. The
20 County's analysis here, which also utilized a market supply factor (17.3%), resulted in a
21 surplus of 10 net developable acres or 2 percent more acreage than needed.⁵⁵ The GMA,
22 and therefore the Board, does not recognize a *de minimis* exception. Nevertheless, it is an
23 unrealistic expectation of any county, in creating the right combination of parcel sizes to
24 accommodate the allocated population that every UGA must be exactly the right size (not
25 too large and not too small) to accommodate only the number of people allocated to it.
26 Therefore, as to the Birch Bay UGA, the Board does not find the County's action to have
27 been clearly erroneous.
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⁵⁴ Ex. C-349, Appendix A.

⁵⁵ Id.

1 **Conclusion:** The Board concludes that Petitioners have carried their burden in
2 demonstrating the County's action regarding the Ferndale UGA in the adoption of
3 Ordinance No. 2010-37 violated RCW 36.70A.110(2). As to the Birch Bay UGA, the Board
4 concludes that Petitioners have not demonstrated that the County's action is clearly
5 erroneous.
6

7 **B. Designation of Agricultural Resource Lands**

8 **Martin Issues 1 and 5 are considered together**
9

- 10 1. Did the County adoption of the comprehensive plan amendment and development
11 regulations fail to comply with the RCW 36.70A.170 by allowing the expansion of an
12 Urban Growth Area without having in place designation criteria for agricultural
13 resource lands of long-term commercial significance, and without having designated
14 such lands pursuant to RCW 36.70A.170 according to the guidelines established
15 under RCW 36.70A.050?
16
17 5. Did the County adoption of the comprehensive plan amendment and development
18 regulations fail to comply with RCW 36.70A.060 because they failed to ensure that
19 the use of lands adjacent to agricultural resources lands does not interfere with the
20 continued use of these lands for agricultural production?

21 Applicable Law

22 RCW 36.70A.170 provides, in pertinent part:

23 (1) On or before September 1, 1991, each county, and each city, shall designate
24 where appropriate:

25 (a) Agricultural lands that are not already characterized by urban growth and
26 that have long-term significance for the commercial production of food or other
27 agricultural products;

28 * * *

29 (2) In making the designations required by this section, counties and cities shall
30 consider the guidelines established pursuant to RCW 36.70A.050.

31 RCW 36.70A.050 provides, in pertinent part:

32 (1) Subject to the definitions provided in RCW 36.70A.030, the department
shall adopt guidelines ... to guide the classification of: (a) Agricultural lands ...

1 ...

2 (3) The guidelines under subsection (1) of this section shall be minimum
3 guidelines that apply to all jurisdictions, but also shall allow for regional
4 differences that exist in Washington state. The intent of these guidelines is to
5 assist counties and cities in designating the classification of agricultural lands,
6 forest lands, mineral resource lands, and critical areas under RCW
7 36.70A.170.

8 RCW 36.70A.060 (1) provides:

9 (1)(a) Except as provided in RCW 36.70A.1701, each county that is required or
10 chooses to plan under RCW 36.70A.040, and each city within such county, shall
11 adopt development regulations on or before September 1, 1991, to assure the
12 conservation of agricultural, forest, and mineral resource lands designated under
13 RCW 36.70A.170. ... Such regulations shall assure that the use of lands
14 adjacent to agricultural, forest, or mineral resource lands shall not interfere with
15 the continued use, in the accustomed manner and in accordance with best
16 management practices, of these designated lands for the production of food,
17 agricultural products, or timber, or for the extraction of minerals.

18 Board Analysis and Findings

19 As the Board noted in its February 4 Order on Reconsideration, Issue 5 is partially
20 dependent on Issue 1. Therefore, the Board must first address whether the County has
21 appropriately designated its agricultural land of long-term commercial significance (Issue 1)
22 and then consider protections afforded to these lands (Issue 5).

23 Martin argues that it was not possible for the County to determine where urban growth
24 should be directed without first designating and conserving agricultural lands of long-term
25 commercial significance (Ag Land of LTCS).⁵⁶ Martin argues that although RCW
26 36.70A.170(1) required counties to take action to designate Ag Land of LTCS by September
27 1, 1991, this action has not yet been completed.⁵⁷ Thus, Martin's allegation of violation of
28 RCW 36.70A.170 is based upon an assertion that the County "failed to act" to designate its
29 Ag Land of LTCS. He states that in March 1992 Whatcom County adopted Ordinance 92–
30
31

32 ⁵⁶ Martin Opening Brief at 11.

⁵⁷ Martin Opening Brief at 12.

1 013, which designated Ag Land of LTCS on an interim basis by readopting the existing, pre-
2 GMA agricultural comprehensive plan designations, but this ordinance did not use the
3 language of RCW 36.70A.170 as the test for determining Ag Land of LTCS designations,
4 nor did it use the guidelines established under 36.70A.050. Martin notes that the 1992
5 ordinance included a proposal to undertake a review of the agricultural and adjoining rural
6 zones to determine whether zoning adjustments should be made to the interim
7 designations, and that although this review was to be completed by July 1, 1993, it has
8 never been done.⁵⁸ Martin argues that this duty to designate Ag Land of LTCS is implicated
9 in the present appeal because the Ferndale UGA expansion includes the Harksell Road
10 R5A Rural Study Area, which is largely comprised of prime agricultural soils and has the
11 potential to be designated as Ag Land of LTCS if criteria required under RCW 36.70A .050
12 were developed and applied.⁵⁹
13
14

15 Martin's argument with regard to Issue 5 is based upon the argument contained in his
16 Issues 1 and 2,⁶⁰ that the County adopted Ordinance 2010–037 without first adopting
17 classifications and designations of agricultural land of long-term commercial significance.
18 Martin argues that the amendments to Agricultural Protection Overlay (APO) Map # 19
19 constitute UGA expansions without analysis of possible rezones to these agricultural lands
20 of long-term commercial significance. He asserts that in the absence of clear criteria for the
21 de-designation of agricultural lands of long-term commercial significance and in the absence
22 of any protective implementing regulations, the County lacks development regulations
23 required by RCW 36.70A.060.⁶¹ Martin asserts that the County also violated this statute by
24 failing to adopt regulations to protect Ag Land of LTCS adjacent to urban growth areas, and
25 by amending Map 19, its rural and agricultural protection overlay, without first adopting
26 regulations sufficient to implement GMA designations of agricultural land of long term
27 commercial significance.
28
29
30

31 ⁵⁸ Martin Opening Brief at 13.

32 ⁵⁹ Id.

⁶⁰ Martin Issue 2 is considered below.

⁶¹ Martin's Brief Re: Issue 5 at 2.

1 In response, the County asserts that it fulfilled its obligation to designate resource lands,
2 including Ag Land of LTCS in May 1997 and that the County considered the WAC 365-190-
3 050 guidelines in its classification and designation.⁶² The County argues that it not only
4 completed these designations, but their adequacy was specifically litigated in *Wells v.*
5 *Whatcom County*, WWGMHB No. 97-2-0030c⁶³ and that, aside from agricultural overlay
6 provisions, the Board upheld the County's agricultural land designation and development
7 regulations adopted to protect these lands.⁶⁴ As to the Vista Malloy area, the County points
8 out none of that property was included in the County's 1997 agricultural land designation,
9 which was held to be compliant.

11
12 Once the County has designated Ag Land of LTCS, it argues that it is under no obligation to
13 change those designations, even during 7 year updates.

14
15 Finally, as to the Harksell Road area, the County states this area is in a UGA Reserve, not
16 within a UGA and therefore the ordinance at issue had no regulatory impact on this area.⁶⁵

17
18 Ferndale, too, notes the County designated its Ag Land of LTCS in its 1997 comprehensive
19 plan; that the plan was challenged before the Board in an appeal that specifically alleged
20 the agricultural land section of the plan, including agricultural overlay provisions, were out of
21 compliance with the GMA.⁶⁶ Nevertheless, the Board specifically found that "the agricultural
22 land provisions comply with the Act".⁶⁷

23
24 As noted above, in *Wells v. Whatcom County*, the Board upheld the County's agricultural
25 land designation and development regulations adopted to protect Ag Land of LTCS. In a
26 2001 Order Taking Action consistent with the decision of Whatcom County Superior Court,
27 the Board rescinded its previous findings, rendering the County's agricultural and overlay
28

29
30 ⁶² County Brief at 7.

31 ⁶³ Final Decision and Order, January 16, 1998.

32 ⁶⁴ County Brief at 8.

⁶⁵ County Brief at 9.

⁶⁶ Ferndale Brief at 16.

⁶⁷ *Wells v. Whatcom County*, WWGMHB No. 97-2-0030c, FDO at 24.

1 plan provisions compliant. The Board affirmed compliance of the County's 1997
2 comprehensive plan designations of Ag Land of LTCS in the 2001 order.

3
4 Martin's Issue 5 which pertains to the adoption of development regulations for Ag Land of
5 LTCS directly hinges on whether or not the County has properly designated such land.
6 Because the County has been found in compliance with its designation of Ag Land of LTCS,
7 this issue is moot.
8

9 **Conclusion:** The Board concludes that Petitioners have failed to carry their burden of proof
10 in demonstrating the County's action in the adoption of Ordinance No. 2010-37 violated
11 RCW 36.70A.170 and 36.70A.060.
12

13 **C. Conservation of Agricultural Resource Lands**

14 **Martin issue 2 and Stalheim issue 8 will be considered together.**

15 **Martin Issue 2:** Did the County adoption of the comprehensive plan amendment and
16 development regulations fail to comply with the RCW 36.70A.170 by allowing the expansion
17 of an Urban Growth Area without considering the County's goal of conserving agricultural
18 resource lands as expressed in Goal 8A and Policy 8A4 [Discourage conversion of
19 productive agricultural land to incompatible nonagricultural uses.] of the Whatcom County
20 Comprehensive Plan and Chapter 2, "Land Use" [Setting of UGAs shall minimize impacts on
21 agricultural land, forestry, mineral resources, watersheds, water resources and critical
22 areas. Cities should absorb additional population at appropriate urban densities before
expanding into areas where growth would adversely impact critical areas or resource lands.]

23 **Stalheim Issue 8:** Did the County's amendment of the official zoning map and the
24 comprehensive plan text and map in Ord. No. 2010-37 fail to comply with the goals of RCW
25 36.70A.020 (2), (8) and ~~RCW 36.70A.060~~⁶⁸ because Whatcom County failed to ensure that
26 the urban uses of the land within the expanded Ferndale UGA, converting agricultural lands
27 and land located adjacent to agricultural lands, would not interfere with continued
agricultural production?

28 Applicable Law

29 RCW 36.70A.170 provides, in relevant part:
30
31 _____
32

⁶⁸ The Board has earlier ruled that a challenge to Ordinance 2010-037 brought under RCW 36.70A.060 is untimely. See, Order on Dispositive Motions.

1 (1) On or before September 1, 1991, each county, and each city, shall designate
2 where appropriate:

3 (a) Agricultural lands that are not already characterized by urban growth and
4 that have long-term significance for the commercial production of food or other
5 agricultural products;

6 ... (2) In making the designations required by this section, counties and cities
7 shall consider the guidelines established pursuant to RCW 36.70A.050.

8 RCW 36.70A.020 (2) provides:
9

10 (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into
11 sprawling, low-density development.

12 RCW 36.70A.020 (8) provides:

13 (8) Natural resource industries. Maintain and enhance natural resource-based
14 industries, including productive timber, agricultural, and fisheries industries.
15 Encourage the conservation of productive forest lands and productive
16 agricultural lands, and discourage incompatible uses.

17 *Board Analysis and Findings*

18 With regard to Issue 2, Martin assumes for the sake of argument only that the County did, in
19 fact, adopt criteria and designations for Ag Lands of LTCS. In that case he argues the
20 Ferndale UGA expansion violated RCW 36.70A.170 and County Comprehensive Plan Goal
21 8A, Policy 8A-4, and Land Use Chapter 2 directives because the UGA expansions involved
22 the "de-designation" of Ag Lands of LTCS without first reviewing the land under adopted
23 classification criteria.
24

25
26 With regard to the "Vista Malloy" area of the Ferndale UGA expansion area, Martin argues
27 that the County amended the zoning and comprehensive plan in a manner that removed
28 agricultural land designations and protections without first going through the steps for de-
29 designation required by the GMA and the County's comprehensive plan. Martin argues that
30 the Vista Malloy area is an area with prime agricultural soils. He argues that the County may
31
32

1 not de-designate resource lands without a justification in the record⁶⁹ and that the de-
2 designation without documentation violates RCW 36.70A.170. Finally he argues that the
3 failure to evaluate lands prior to de-designation comprises substantial interference with
4 Goals 2 and 8 of the GMA and merits the imposition of invalidity in regards to the Ferndale
5 UGA expansion.
6

7 With regard to the "Harksell Road" area, Martin notes that in 2009 the County adopted
8 findings stating that the area east of Ferndale was not suitable for urban growth area
9 expansion because it deserved continued protection under the APO zoning overlay
10 designation.⁷⁰ Martin points out that the 2007 rural lands study attempted to apply objective
11 criteria to designate Ag Lands of LTCS and that under those criteria Harksell Road rated
12 highly. Martin argues that Ordinance 2010-037 ignores earlier County findings and the
13 mandate to consider effects on Ag Land of LTCS in making new UGA decisions⁷¹.
14
15

16 With regard to Stalheim's Issue 8, Stalheim incorporates by reference the arguments
17 submitted by Martin in Issues 2, 4 and 5.⁷²
18

19 On Issues 2 and 5 the County argues there is no evidence that any land in the Vista Malloy
20 area is subject to APO zoning requirements.⁷³ The County also points out that agricultural
21 land was properly designated in 1997 and did not include this land. Thus, the County argues
22 that it met its legal obligations to protect agricultural lands in its 1997 comprehensive plan
23 and development regulations. Finally, the County points out the current County Council
24 repealed the portion of the prior ordinance that removed this area from the UGA. The prior
25 Council did not go through any procedure to designate this land as agricultural lands in that
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30 ⁶⁹ Martin Opening Brief at 17.

31 ⁷⁰ Martin Opening Brief at 18.

32 ⁷¹ As noted below, the Harksell/Enterprise Road area was in fact placed in Urban Reserve, not included in the UGA.

⁷² Stalheim Opening Brief at 25.

⁷³ County Brief at 9.

1 ordinance and the present Council could amend that decision without going through a
2 process to "de-designate" it, the County maintains.

3
4 Similarly, Ferndale argues Petitioners have not submitted evidence that any land within
5 either the Vista Malloy or Harksell/Enterprise Road areas has been designated as Ag Land
6 of LTCS or is subject to the APO zone.⁷⁴

7
8 Petitioners assume lands within the Agricultural Protection Overlay (APO) are Ag Lands of
9 LTCS and that by removing this overlay, as shown on the amended land use maps, the
10 County thereby "de-designated" such lands. As Martin admits, WCC 20.38, Agriculture
11 Protection Overlay, "never explicitly states that APO lands subject to its protection are
12 actually GMA resource lands designated under RCW 36.70.170."⁷⁵ In fact, the APO
13 designation is much broader than that, and includes "all rural lands designated R-5A or R-
14 10A on the official zoning map"⁷⁶ outside a UGA and held in parcels of 20 acres or larger.
15 Thus, the fact that the County removed the APO designation from land brought into the
16 Ferndale UGA does not demonstrate that the County thereby "de-designated" Ag Lands of
17 LTCS. Therefore, any argument regarding the alleged failure of the County to evaluate
18 these lands prior to "de-designation" is likewise unsupported.
19
20

21 Furthermore, as Ferndale points out, at the time of the Board's 2001 order, Vista Malloy was
22 actually included in the Ferndale UGA⁷⁷ and so could not have been counted toward any
23 calculation of agricultural land. It also does not seem relevant that the Vista Malloy area was
24 briefly designated Urban Reserve because this status does not confer AG Land of LTCS
25 status pursuant to the GMA.
26

27
28 The Board notes the GMA does not require that AG Land of LTCS remain designated in
29 perpetuity. Furthermore, the GMA does not delineate how a County is to determine that
30

31 ⁷⁴ Ferndale Brief at 19.

32 ⁷⁵ Martin Opening Brief at 16.

⁷⁶ WCC 20.38.050.

⁷⁷ Ferndale Brief at 20.

1 lands once designated should then be de-designated. The analysis employed by the Boards
2 and by the Washington Supreme Court has been to apply the same statutory criteria for
3 purposes of de-designation used when designating such lands.⁷⁸ However, despite Martin's
4 assertion to the contrary, this process does not require a rigorous justification subject to
5 heightened scrutiny.⁷⁹ In this case, the Board finds Petitioners base their argument on an
6 assertion that in expanding the Ferndale UGA the County de-designated AG Land of LTCS
7 but, as noted *supra* and here, this assertion is unsupported by the evidence.
8

9
10 With regard to the Enterprise/Harksell Road area, Petitioners rely heavily on findings made
11 in Ordinance 2009-071 that the expansion of Ferndale into this area would not be consistent
12 with protection of AG Land of LTCS.⁸⁰ However, in adopting Ordinance 2010-037, the
13 Council is free to revisit these findings and come to a different conclusion as to the suitability
14 of this land for inclusion in the UGA. In fact, Ordinance 2010-037 did not bring the
15 Enterprise/Harksell Road area into the Ferndale UGA. The text of Exhibit A to the
16 Ordinance notes that "Lands in the vicinity of Enterprise Rd. and Slater Rd. have been
17 designated as Urban Growth Area Reserves for future employment growth at the request of
18 the City of Ferndale. Thus, Martin's assertion that the County failed to comply with the RCW
19 36.70A.170 by allowing the expansion of an Urban Growth Area in this area without
20 considering the County's goal of conserving agricultural resource lands is, at best,
21 premature.
22
23

24 **Conclusion:** The Board concludes that Petitioners have failed to carry their burden of proof
25 in demonstrating the County's action in the adoption of Ordinance No. 2010-37 failed to be
26 guided by RCW 36.70A.020(2) and .020(8) or violated RCW 36.70A.170.
27
28

29
30 ⁷⁸ CCNRC/*Futurewise v. Clark County*, Case 09-2-0002, Amended FDO at 19 (Aug. 10, 2009).

31 ⁷⁹ Within Martin's brief, he cites a 2000 decision of the CPSGMHB in *Grubb v. City of Redmond*, Case 00-3-0004 which
32 stated that a de-designation action is subject to heightened scrutiny and required demonstrable and conclusive evidence in
the record. However, this case was expressly overruled by the Court of Appeals in *Redmond v. CPSGMHB*, 116 Wn. App.
58 (2003), which found such a standard was contrary to RCW 36.70A.320 and amounted to an inappropriate shifting of the
burden.

⁸⁰ Martin Opening Brief at 19.

1 **D. State Environmental Policy Act (SEPA)**

2 **Martin Issue 6:** Did the County's adoption of the comprehensive plan amendment and
3 development regulations fail to comply with RCW 43.21C.030(c)-(h) because they failed to
4 identify and address adverse environmental impacts, consider alternatives to the proposed
5 action?

6 *Applicable Law*

7 Although Martin Issue 6 cites RCW 43.21C.030(c)-(h), his briefing relies solely on the
8 impacts and mitigation requirements which are contained in RCW 43.21C.030(c).

9 This provision provides that cities and counties shall:

10 (c) Include in every recommendation or report on proposals for legislation and
11 other major actions significantly affecting the quality of the environment, a
12 detailed statement by the responsible official on:

13 (i) the environmental impact of the proposed action;

14 (ii) any adverse environmental effects which cannot be avoided should the
15 proposal be implemented;

16 (iii) alternatives to the proposed action;

17 (iv) the relationship between local short-term uses of the environment and the
18 maintenance and enhancement of long-term productivity; and

19 (v) any irreversible and irretrievable commitments of resources which would
20 be involved in the proposed action should it be implemented;

21 *Board Discussion and Analysis*

22 Whatcom County, on May 8, 2009, issued a 10-Year UGA Review Draft Environmental
23 Impact Statement (DEIS). Subsequently, the County issued a Final EIS (FEIS) on October
24 23, 2009.⁸¹ The actions taken within Ordinance 2010-037 relied upon that environmental
25 review.⁸²

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32 ⁸¹ Index C-224.

⁸² Ordinance 2010-037, Finding No. 11 at Page 5

1 The Board sees Martin's argument based on two things. First, that Whatcom County
2 violated SEPA by adopting an action which was in opposition to conclusions set forth in the
3 environmental documents. Second, that Whatcom County violated SEPA by adopting
4 existing environmental documents without conducting additional analysis and, that this
5 failure to conduct additional analysis left decision-makers and the public without the
6 knowledge of potential adverse impacts and proposed mitigation.
7

8 As to Martin's first assertion that the County, under SEPA, is required to adopt a specific
9 action, Martin misapplies SEPA case law. As our Supreme Court stated in *Norway Hill*
10 *Preservation v. King County*.⁸³ [Emphasis added]
11

12 [T] procedural provisions of SEPA constitute an environmental full disclosure
13 law. The act's procedures promote the policy of fully informed decision making
14 by government bodies ... *SEPA does not demand any particular substantive*
15 *result in governmental decision making* ... most important aspect of SEPA is
16 the consideration of environmental values.

17 This holding was reiterated in *Save Our Rural Environment v. Snohomish County*.⁸⁴
18 [Emphasis added]

19 SEPA is essentially a procedural statute to ensure that environmental impacts
20 and alternatives are properly considered by the decision-makers. It was *not*
21 *designed* to usurp local decision-making or *to dictate a particular substantive*
22 *result*.

23 The procedural aspect of SEPA continues to be applied today.⁸⁵ Thus, Martin's argument in
24 this regard has no merit.
25
26
27

28 ⁸³ *Norway Hill Preservation & Protection Assoc. v. King County Council*, 87 Wn.2d 267, 272 (1976)

29 ⁸⁴ *SORE v. Snohomish County*, 99 Wn.2d 363, 373 (1983)(Internal citations omitted).

30 ⁸⁵ See, e.g. *Glasser v. City of Seattle*, 139 Wn. App. 728 (2007)(holding that the principal purpose of SEPA is
31 to provide decision makers and the public with information about potential adverse impacts of a proposed
32 action); *Davidson Serles v. City of Kirkland*, 159 Wn. App. 616 (2011) (holding the procedural requirements of
SEPA are merely designed to provide full environmental information); *Chuckanut Conservancy v. Dep't of*
Natural Res., 156 Wn. App. 274, 284 (2010)(Holding that SEPA does not demand a particular substantive
result in government decision making).

1 As to Martin's second assertion, Martin fails to acknowledge that SEPA specifically allows
2 for the use of existing environmental documents that analyze all or part of the environmental
3 impacts of a proposal.⁸⁶ Therefore, the Board finds no violation of SEPA simply because
4 the County chose to utilize existing environmental documents.

5
6 The question becomes whether Whatcom County's reliance on these documents was
7 justified or if supplemental environmental review was required. Martin asserts additional
8 review was needed because the County failed, in relationship to agricultural land, to account
9 for the probable significant impacts of the Ferndale and Birch Bay UGA expansions and it
10 also did not properly analyze the Vista Malloy de-designation for significant adverse
11 impacts.⁸⁷ In response, Whatcom County contends the EIS is a programmatic, non-project
12 document which contains an adequate analysis of all alternatives in a broad fashion such
13 that no additional SEPA review was needed.⁸⁸

14
15
16 SEPA requires the Board to afford substantial weight to an agency's determination of the
17 adequacy of an EIS.⁸⁹ SEPA provides for the supplementation of existing environmental
18 review via a Supplement EIS (SEIS). WAC 197-11-405(4) and 197-11-600 provide that a
19 SEIS is required if there are either substantial changes that are likely to have significant
20 adverse environmental impacts or new information is available indicating probable
21 significant adverse impacts.⁹⁰ A SEIS is not required if the probable adverse impacts are
22 covered by the range of alternatives and impacts analyzed in the existing documents.⁹¹

23 The burden is on Martin to demonstrate the County's determination not to conduct
24 additional environmental review was clearly erroneous and to provide the Board with
25 substantial changes that would warrant the preparation of a SEIS.
26
27

28
29 ⁸⁶ RCW 43.21C.034; WAC 917-11-600.

30 ⁸⁷ Martin Opening Brief, at 24-25

31 ⁸⁸ County Response Brief, at 15-16; Intervenor Anchor Manor joined in the County's response on this issue,
Anchor Manor Response Brief, at 14

32 ⁸⁹ RCW 43.21C.090

⁹⁰ WAC 197-11-600(3)(b)(i)-(ii)

⁹¹ WAC 197-11-600(3)(b)(ii)

1 Given the fact that this is a non-project action, the EIS is granted greater flexibility, with
2 analysis permitted at a level of detail appropriate to the scope of the proposal's objectives,
3 which included the revision of UGA boundaries, and the level of planning being
4 considered.⁹² The County's environmental review addressed five alternatives – No Action
5 Current, No Action Trend, Alternative X, Alternative Y, and Executive's Recommendation.⁹³
6 The DEIS, at Table 2-6 and Table 2-7, clearly address land use needs in relationship to the
7 County's UGAs, including surplus and deficit.⁹⁴ The FEIS, at Table 2-9, addressed
8 changes to UGA boundaries as envisioned by the Executive's Recommendation.⁹⁵ Both
9 the DEIS, at Chapter 4, Section 4.5, and the FEIS, at Chapter 3, Section 3.5, speak to
10 impacts, including the conversion of agricultural lands. Therefore, the probable impacts
11 Martin alleges – loss of agricultural land to urban use – were expressly before the County's
12 decision-makers and Martin provides no substantial changes in the County's proposal
13 considered within these documents that warrants a SEIS. The Board finds no clear error in
14 the County's determination that the existing environmental review contained in the DEIS
15 and FEIS was adequate in regards to Ordinance 2010-037.

16
17
18
19 **Conclusion:** The Board finds and concludes Petitioner Martin failed to carry his burden of
20 proof in demonstrating the County's action in adopting Ordinance No. 2010-037 violated
21 RCW 43.21C.030(c)-(h).
22

23 **E. Urban Sprawl**

24
25 **Stalheim Issue 1** Did the County's amendment of the official zoning map and the
26 comprehensive plan text and map in Ord. No. 2010-37 fail to comply with the goals in RCW
27 36.70A.020(1), (2) and (12) by allowing the inappropriate conversion of undeveloped land
28 into suburban, low-density sprawl because land use regulations have not been adopted and
29 applied to ensure that development will occur at urban densities?
30

31 ⁹² WAC 197-11-442; FEIS at 1-1 – 1-2 (Objectives).

32 ⁹³ FEIS at Page 2-12.

⁹⁴ DEIS, Table 2-6 at 2-22 and Table 2-7 at 2-23

⁹⁵ FEIS, Table 2-9, at 2-28.

1 Applicable Law

2 RCW 36.70A.020(1), (2) and (12) provide:

3 (1) Urban growth. Encourage development in urban areas where adequate public
4 facilities and services exist or can be provided in an efficient manner.

5 (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land
6 into sprawling, low-density development.

7
8 (12) Public facilities and services. Ensure that those public facilities and services
9 necessary to support development shall be adequate to serve the development
10 at the time the development is available for occupancy and use without
11 decreasing current service levels below locally established minimum standards.

12 Board Analysis and Findings

13 As to Goal 2, Stalheim argues that the County has ignored its land capacity analysis as well
14 as requirements that public services be provided in an efficient manner. Consequently,
15 Stalheim asserts, this will lead to sprawl because the new UGAs are not accompanied by
16 any sprawl-reducing measures such as minimum urban densities for the County or
17 Ferndale.⁹⁶

18
19 In response, the County argues Stalheim has failed to mention that the areas at issue in the
20 Vista Malloy area and the Birch Bay UGA were rezoned UR-4 (Urban Residential) and that
21 under that zoning designation these areas will remain at a maximum density of one unit per
22 ten acres until they have public water and sewer. If they do receive public water and sewer
23 and remain in the unincorporated area, they will be subject to a minimum density of 4 units
24 per acre.⁹⁷

25
26
27 Ferndale argues Stalheim is incorrect in stating that Policy 2P-1 of the County
28 Comprehensive Plan requires minimum densities, but in fact states that its goal is to “ensure
29
30
31

32 ⁹⁶ Stalheim Opening Brief at 6.

⁹⁷ County Brief at 18.

1 that cities have adopted mechanisms which will encourage densities at desired levels”.⁹⁸
2 Ferndale notes RCW 36.70A.020 provides guidance and outlines planning goals but does
3 not require or even use the term “minimum densities”. Nevertheless, Ferndale points out
4 that it has adopted a number of mechanisms to ensure desired densities and discourage
5 sprawl. As to Vista Malloy, Ferndale too points to County zoning of UR-4 which is
6 applicable only if the area has sewer and water service. Otherwise, the land would have to
7 be developed at one unit per 10 acres, and is essentially fully developed until the City
8 annexes it.⁹⁹ Upon annexation, it would be subject to the City’s sprawl-reducing measures,
9 including: 1) reduced water and sewer connection fees for dense development; a minimum
10 of 15 du/ac within the City Center and Urban Residential zones; and other incentives for
11 high density development.
12

13
14 The Board notes that WCC 20.20.252 provides for “Maximum density, minimum lot size and
15 maximum lot size within an urban growth area.” For properties in a UR-4 district, which
16 includes the Vista Malloy area, maximum gross density is 4 dwelling units/1 acre and
17 minimum net density: 4 dwelling units/1 acre, if water and sewer service is provided. While
18 the GMA does not establish densities that constitute “sprawling, low-density development”,
19 the Board does not find that Petitioner has proven that densities of 4 dwelling units per acre
20 would constitute sprawl. As Intervenor points out, absent water and sewer service, the land
21 can only be developed at one unit per ten acres, thus effectively preventing the subdivision
22 of any lot under 20 acres. Intervenor points out this is consistent with Comprehensive Plan
23 Policy 2R-3 which requires ten acre minimum lot sizes within UGAs until public facilities and
24 services can be provided.
25
26

27 Goals 1 and 12 present a different problem. Goal 1 indicates that cities and counties should
28 “encourage development in urban areas where adequate public facilities and services exist
29 or can be provided in an efficient manner” and Goal 12 encourages facilities and services
30
31

32 ⁹⁸ Ferndale Brief at 21.

⁹⁹ Ferndale Brief at 23.

1 necessary to support development. However, as noted above, in the absence of current
2 capital facilities plans for sewer and fire, it cannot be said that the Ferndale UGA has
3 “adequate existing public facility and service capacities to serve such development”.
4 Approving the Ferndale UGA expansion in the absence of adequate fire and sewer services
5 is a violation of Goals 1 and 12.
6

7 Anchor Manor points out that with regard to its property in the Birch Bay UGA, its
8 development complies with Goal 1 because it is adjacent to water, sewer, natural gas, and
9 abuts two major roads.¹⁰⁰ It argues that the Birch Bay Plan complies with Goal 2 because it
10 envisions a compact area of development, thus preventing sprawl. The zoning is UR-4, an
11 urban density. As to Goal 12, Anchor Manor reiterates that the area has services available
12 presently, and those services will be available at the time of occupancy.¹⁰¹ Petitioner has
13 not addressed the Anchor Manor property directly either in its opening brief or reply on its
14 Issue 1. In light of the unrebutted arguments from Anchor Manor, the Board finds that
15 Petitioner has failed to carry its burden of proof in regards to Birch Bay
16
17

18 **Conclusion:** The Board concludes that Petitioners have failed to carry their burden of proof
19 in demonstrating Whatcom County’s action in the adoption Ordinance No. 2010-37 failed to
20 be guided RCW 36.70A.020(1), (2) and (12) in regards to Birch Bay. However, the Board
21 concludes that Ferndale’s lack of fire and sewer plans demonstrates Whatcom County failed
22 to be guided by RCW 36.70A.020(1) and (12).
23
24

25 **F. Public Facilities and Services**

26 **Stalheim Issue 3:** Did the County’s amendment of the official zoning map and the
27 comprehensive plan text and map in Ord. No. 2010-37 fail to comply with the goals in RCW
28 36.70A.020(1), (2), (3), (4) and (12) and RCW 36.70A.110(1)-(3) by failing to encourage
29 development first in urban areas where adequate public facilities and services exist or can
30 be provided in an efficient manner? ¹⁰²

31 ¹⁰⁰ Anchor Manor Brief at 4.

32 ¹⁰¹ Anchor Manor Brief at 5.

¹⁰² The Board finds the focus of Stalheim’s brief is on the location of urban growth (36.70A.110(3)) and the adequacy of public facilities and services (RCW 36.70A.020(1) and 36.70A.020(12)). Although Stalheim

1
2 Applicable Law

3 RCW 36.70A.110 provides, in pertinent part:

4 (3) Urban growth should be located first in areas already characterized by urban
5 growth that have adequate existing public facility and service capacities to serve
6 such development, second in areas already characterized by urban growth that will
7 be served adequately by a combination of both existing public facilities and
8 services and any additional needed public facilities and services that are provided
9 by either public or private sources, and third in the remaining portions of the urban
10 growth areas. ...

11 The goals applicable to Stalheim's argument are:

12 RCW 36.70A.020(1): Urban growth. Encourage development in urban areas
13 where adequate public facilities and services exist or can be provided in an
14 efficient manner

15 RCW 36.70A.020(12): Public facilities and services. Ensure that those public
16 facilities and services necessary to support development shall be adequate to
17 serve the development at the time the development is available for occupancy and
18 use without decreasing current service levels below locally established minimum
19 standards.

20 Board Analysis and Findings

21 Under the GMA urban growth is to occur in areas where adequate public facilities and
22 services exist. As set forth above, RCW 36.70A.110(3) suggests that "Urban growth should
23 be located first in areas already characterized by urban growth that have adequate existing
24 public facility and service capacities to serve such development". Likewise RCW
25 36.70A.020(1) sets forth as a goal that cities and counties should "Encourage development
26 in urban areas where adequate public facilities and services exist or can be provided in an
27 efficient manner"
28

29
30 provides conclusory references to .110(1), .110(2), .020(2), .020(3), .020(4), no direct briefing is presented in
31 relationship to these goals and/or requirements of the GMA. Thus, pursuant to WAC 242-02-570(1), the Board
32 deems these aspects of Stalheim Issue 3 abandoned.

1 The language of RCW 36.70A.020(12) is stronger, however. It does not use the term
2 “should” or “encourage” but instead states that local jurisdictions are to: “Ensure that those
3 public facilities and services necessary to support development shall be adequate to serve
4 the development . . .” The question then, is whether at the time the County authorized the
5 Ferndale UGA expansion it had ensured that adequate public facilities were available.
6

7
8 Water Service Plan

9 Stalheim argues that Ordinance 2010-037 failed to demonstrate how the Ferndale UGA has
10 either adequate public facilities and services or can be provided with them in an efficient
11 manner.¹⁰³ It notes the staff report for this ordinance states that the city's water system plan
12 was approved by the State in 2010 but was “prepared to serve a population slightly less
13 than the population proposed in the 2010 UGA ordinance.”¹⁰⁴ He states the City of
14 Ferndale's water system plan is approved for only 17,550 people, 3,157 short of the
15 population allocated by Ordinance 2010-037.
16

17
18 With regard to the adequacy of Ferndale's 2010 Water System Plan, Ferndale argues that
19 Petitioner's arguments consist of incorrect statements about the population the Water Plan
20 is approved to serve and about the adequacy of water service to the Urban Reserves.
21

22 In examining the County's CFP, it indicates that the assumed twenty-year population
23 projection is 19,334¹⁰⁵ and the 2006 Ferndale Water System Plan was based on this same
24 assumed population.¹⁰⁶ As Ferndale notes, Petitioners do not recognize that the City and
25 the UGA will not be served by Ferndale alone, but by other water purveyors that provide
26 service both within the city limits and the UGA.¹⁰⁷ Petitioners have failed to demonstrate a
27 violation of the GMA with regard to the provision of water.
28

29
30
31 ¹⁰³ Stalheim Opening Brief at 12.

¹⁰⁴ Id. at 12-13.

¹⁰⁵ Appendix S, Tab 1, Whatcom County Capital Facilities Plan, Table 51, p. 82.

¹⁰⁶ See, Exhibit C-515, page 2-14, Table 2-18.

¹⁰⁷ Ex. C-514 Water Plan.

1 Sewer and Fire Plans

2
3 Stalheim also points out that the City of Ferndale's comprehensive wastewater plan does
4 not include the areas added to the Ferndale UGA and that there is no evidence in the record
5 demonstrating adequate public facilities and services exist or can be provided in an efficient
6 manner. Stalheim further contends fire protection to the Ferndale UGA is provided by
7 Whatcom County Fire District 7 which, according to Stalheim, does not even have a capital
8 facilities plan.¹⁰⁸
9

10 Ferndale argues that Stalheim's arguments will be rendered moot upon the adoption of the
11 new 2011 City of Ferndale draft comprehensive sewer plan and the new 2011 – 2031
12 Whatcom County Fire Dist. No. 7 Capital Facility Plan, both of which will occur in April of
13 2011.¹⁰⁹ Ferndale argues this demonstrates substantial completion of the plans.
14

15 The Board notes that it has previously denied Ferndale's motion to supplement the record
16 with the draft of the Sewer and Fire Plans because they were in draft form and had not been
17 formally adopted.¹¹⁰ The existence of draft plans, even were they to be part of the record, is
18 not sufficient to demonstrate compliance with the GMA in this regard. RCW 36.70A.110(3)
19 provides:
20

21 Urban growth should be located first in areas already characterized by urban
22 growth that have adequate existing public facility and service capacities to
23 serve such development, second in areas already characterized by urban
24 growth that will be served adequately by a combination of both existing public
25 facilities and services and any additional needed public facilities and services
26 that are provided by either public or private sources, and third in the
27 remaining portions of the urban growth areas.

28 Because neither updated fire nor wastewater service plans were in place *at the time of the*
29 *adoption* of Ordinance 2010-037, it cannot be said that adequate provision of public facilities
30

31 ¹⁰⁸ Stalheim Opening Brief at 14.

32 ¹⁰⁹ Ferndale Brief at 25-26.

¹¹⁰ In addition, the Board has denied Ferndale's motion to take official notice of the adopted 2011
Comprehensive Sewer Plan.

1 had been provided for prior to the authorization of the Ferndale UGA. Instead, the 1996
2 wastewater plan shows a Wastewater Planning Service Area that does not include the
3 areas added to the Ferndale UGA.¹¹¹

4
5 Finding 50 of the Ordinance finds that the Ferndale UGA is provided fire protection services
6 from Whatcom County Fire District 7 and that “Fire District 7 does not have a capital
7 facilities plan”.

8
9 Thus, in the absence of such capital facilities plans, it cannot be said that the Ferndale UGA
10 has “adequate existing public facility and service capacities to serve such development” and
11 the Board finds this to be a violation of RCW 36.70A.110(3).
12

13 *Birch Bay*

14 Anchor Manor argues that its project has public facilities and services nearby and will be
15 served by those services at occupancy.¹¹² It further argues that its project is vested and that
16 a vested project application is considered “characterized by urban growth” and therefore it
17 was not clearly erroneous for the County to include vested project applications within its
18 UGA. The Board notes that Petitioners have not addressed the adequacy of services to the
19 Birch Bay UGA, and have failed to carry their burden of proof with regard to this UGA on this
20 issue.
21
22

23 **Conclusion:** The Board concludes that Petitioners, as to fire protection and wastewater
24 (sewer) facilities to serve the Ferndale UGA have carried their burden of proof in
25 demonstrating the County’s action in adopting Ordinance No. 2010-37 violated RCW
26 36.70A.110(3) and 36.70A.020(1) and .020(12) in the Ferndale UGA. However, as to the
27 adequacy of water utilities for the Ferndale UGA, they have failed to carry their burden of
28 proof.
29
30
31

32 ¹¹¹ See, Figure 2-1, Wastewater Planning Service Area, page 2-2, Exhibit 9 to Stalheim Opening Brief.

¹¹² Anchor Manor Brief at 9.

1 **G. Open Space Corridors**

2 **Stalheim Issue 4:** Did the County's amendment of the official zoning map and the
3 comprehensive plan text and map in Ord. No. 2010-37 fail to comply with RCW 36.70A.160
4 and County Wide Planning Policy D-5 that requires the County to identify open space
5 corridors within and between urban growth areas and between cities for recreation, wildlife
6 habitat, trails and connection of critical areas?

7 *Applicable Law*

8 RCW 36.70A.160 provides: [In relevant part]

9 Each county and city that is required or chooses to prepare a comprehensive
10 land use plan under RCW 36.70A.040 shall identify open space corridors within
11 and between urban growth areas. They shall include lands useful for recreation,
12 wildlife habitat, trails, and connection of critical areas as defined in RCW
13 36.70A.030 ...

14 County Wide Planning Policy D-5 provides:¹¹³

15 All cities should grow in an efficient manner while maintaining their character
16 and, where reasonable, shall provide for adequate open space between cities to
17 prevent strip development.

18
19 *Board Analysis and Findings*

20 Stalheim notes that Ordinance 2010-037 amended the County Comprehensive Plan to
21 include UGA Reserves for the City of Ferndale that abut the UGA for the City of Bellingham
22 and that Map 10, which designates the open space corridors in Whatcom County, does not
23 include any designation of open space corridors between the UGAs of Ferndale and
24 Bellingham.¹¹⁴ Stalheim argues that this is contrary to the GMA and to Policy D-5 which
25 addresses the need for open space between cities.
26
27
28
29
30
31
32

¹¹³ Whatcom County Comprehensive Plan, Appendix C at C-5

¹¹⁴ Stalheim Opening Brief at 15.

1 In response, the County argues that the cited statute relates to UGAs not UGA Reserves
2 and that Petitioner fails to make this distinction.¹¹⁵ The County is correct. The GMA makes
3 no mention of the term “UGA Reserves”.
4

5 Before directly addressing Stalheim’s argument, the Board must correct Stalheim’s
6 terminology. In arguing this issue, Stalheim repeatedly states that the County failed to
7 “designate” open space corridors. However, RCW 36.70A.160 does not require that
8 Whatcom County *designate* open space corridors, it requires that the County *identify* them.
9 Given the GMA’s use of *designate* in relationship to resource lands and critical areas, RCW
10 36.70A.170, and the enhanced protection applied to those lands/areas due to their
11 designation, RCW 36.70A.060, the Board finds the term designate is distinct from identify
12 within the GMA.
13
14

15 The Board takes official notice of the definitions for UGA Reserves as provided in the
16 Whatcom County Comprehensive Plan:¹¹⁶
17

18 **Urban Growth Area Reserves:** These are areas that are adjacent and
19 contiguous to Urban Growth Areas which appear to be suitable for future
20 inclusion of the respective Urban Growth Area. These lands are held in
21 reserve until it is demonstrated that they are needed for urban growth, and that
22 consideration is given to ensuring adequate public facilities and services,
23 reduction of sprawl, economic development, open space corridors and natural
24 resource conservation.

25 While Petitioner takes issue with Map 10 in that it does not identify open space corridors
26 between Ferndale and Bellingham, the amendments to this map effectuated by Ordinance
27 2010-037 only relate to the inclusion of the UGA Reserve area adjacent to the Bellingham
28 UGA. Nothing in RCW 36.70A.160 suggests that this triggered an obligation to identify
29 open space corridors *at this time. (emphasis added)*.
30
31

32 ¹¹⁵ County Brief at 19.

¹¹⁶ County Comprehensive Plan, Appendix A – Glossary, at A-8

1 The Board recognizes that the County will identify such open space corridors in the future,
2 and the County should not engage in activities that would preclude this possibility. In fact,
3 Finding 45 of the Ordinance 2010-037 appears to anticipate this concern and recognized
4 the need to identify open space corridors between Ferndale and Bellingham before this area
5 is permanently added to a UGA as it provides:

6 The Slater and I-5 UGA Reserve is adjacent to the Bellingham UGA. The City
7 of Ferndale has indicated that it is willing to work the City of Bellingham, the
8 Port of Bellingham, and Whatcom County to identify appropriate open space
9 corridors in this area.

10 **Conclusion:** The Board concludes that Petitioners have failed to carry their burden of proof
11 in demonstrating the County's action in the adoption of Ordinance No. 2010-37 violated
12 RCW 36.70A.160.
13

14 **H. Internal Consistency**

15 **Stalheim Issue 5** Did the County's amendment of the official zoning map and the
16 comprehensive plan text and map in Ord. No. 2010-37 fail to comply with the requirements
17 of RCW 36.70A.070(preamble) because the action was internally inconsistent with other
18 portions of the comprehensive plan and development regulations, including but not limited
19 to the Whatcom County Comprehensive Plan, Goal 2P and Policy 2P-1; the Whatcom
20 County Comprehensive Plan criteria for transferring property from Urban Growth Area
21 Reserve to Urban Growth Area; and ~~Whatcom County Code Sec. 2.160.080?~~¹¹⁷

22 Applicable Law

23 The preamble to RCW 36.70A.070 provides (In relevant part)

24 The comprehensive plan of a county ... shall be an internally consistent
25 document and all elements shall be consistent with the future land use map ...
26

27 The Goal and Policy cited by Stalheim are contained in the Land Use Chapter, Urban
28 Growth Areas section, of the County's Comprehensive Plan. Comprehensive Plan Goal 2P
29 provides: (In relevant part)

30 [E]ncourage Ferndale to establish new residential developments at
31 densities averaging five to ten units per net residential acre ...
32

¹¹⁷ This aspect of Issue 5 was dismissed by the Board in the January 7, 2011 Order on Dispositive Motions.

1
2 Comprehensive Plan Policy 2P-1 provides:

3 Ensure that cities have adopted mechanisms which will encourage densities at
4 desired levels.

5
6 The Comprehensive Plan provides the following general criteria for transferring properties
7 from the Urban Growth Area Reserve to the Urban Growth Area are set forth below:¹¹⁸

8 1. Need for Land Capacity. The need for additional land is necessary due to
9 growth higher than allocated to the urban area or less land capacity than
10 analyzed. A transfer from Urban Growth Area Reserve to Urban Growth Area
11 will not be allowed which would provide capacity to accommodate substantially
12 more than 20 years of urban growth. Additional consideration can be made
13 regarding the mix of housing and employment opportunities that are required
14 to serve the Urban Growth Area which could be accommodated in the Urban
15 Growth Area Reserve and which cannot be accommodated within the Urban
16 Growth Area.

17 2. Adequate Public Facilities and Services. There are plans and capacity to
18 serve the areas with urban governmental services as set forth in the Growth
19 Management Act. There is no requirement to extend these services prior to
20 transferring the area from Urban Growth Area Reserve to Urban Growth Area,
21 but the Capital Facility Plans must document the capacity and plans to serve
22 at urban levels of service within the 20-year planning period.

23 3. Land Use Plans. The respective city, or county for unincorporated Urban
24 Growth Areas, have comprehensive plans and land use regulations in place to
25 allow for the transition from Urban Growth Area Reserve to Urban Growth
26 Area. The respective jurisdiction will also have in place development
27 regulations that ensure urban densities are achieved within the existing Urban
28 Growth Area. Urban Growth Area Reserves should be jointly planned between
29 Whatcom County and the respective city,

30 4. Natural Resource Lands. Expansion into the Urban Growth Area Reserve
31 will not allow uses that are incompatible with adjoining natural resource lands
32 unless mitigated through buffers, increased setbacks or other measures as
 necessary to maintain the productivity of the adjacent resource lands. If the
 expansion is into lands zoned Agricultural, the city and county shall have an
 interlocal agreement or regulations in place that implement a program that

¹¹⁸ Whatcom County Comprehensive Plan, Land Use Chapter at 2-72 to 2-73

1 outlines the respective roles in protecting at least 100,000 acres of agricultural
2 land in Whatcom County.

3 5. Environment. Land use regulations are in place to ensure protection of the
4 environment and sensitive watersheds.

5 6. Open Space Corridors. Continued provisions are made for open space
6 corridors within and between Urban Growth Areas where not otherwise
7 precluded by previous development patterns.

8
9 Board Analysis and Findings

10 The internal consistency requirement of RCW 36.70A.070's preamble means that the goals
11 and policies (the text) *within* the County's Comprehensive Plan are to be compatible with
12 each other; that is one goal or policy may not frustrate another. It also means that maps
13 contained within the Comprehensive Plan, such as Whatcom County's Comprehensive Plan
14 Designation Map, Map #8, and the Ferndale UGA Map, Map #UGA-4, are to be consistent
15 with the text of the Comprehensive Plan. RCW 36.70A.070's preamble does not establish a
16 requirement for documents or plans outside of the comprehensive plan to be consistent with
17 the comprehensive plan¹¹⁹ nor does it require development regulations to be consistent with
18 the comprehensive plan.
19

20
21 Stalheim argues that the adoption of amendments to the official zoning map and the
22 comprehensive plan text and map in Ordinance 2010-037 creates an internally inconsistent
23 document. He notes that Goal 2P seeks an average density in Ferndale of 5 to 10 units per
24 net residential acre, yet the Ordinance reduces densities "for purposes of the land capacity
25 analysis" to 4.5 units per net residential acre.¹²⁰ He further notes that Policy 2P-1 states
26 "Ensure that cities have adopted mechanisms which will encourage densities at desired
27
28

29
30 ¹¹⁹ Provisions such as RCW 36.70A.100, which states that the comprehensive plans of neighboring
31 jurisdictions are to be consistent, requires such "external" consistency. The only exception to this general rule
32 is for functional plans, such as water or sewer plans, that are incorporated by reference, relied upon, and
intended to fulfill GMA requirements; these plans must be consistent with the jurisdiction's comprehensive plan
as they are, in fact, part of the plan.

¹²⁰ Stalheim Opening Brief at 17.

1 levels” yet neither Ferndale nor the County have any adopted mechanisms, such as
2 minimum density or maximum lot size provisions within their urban zones, to ensure that this
3 will occur.¹²¹ Stalheim further asserts that the County erred by removing the “Vista Malloy”
4 area from the Ferndale UGA Reserve and transferring it to the unincorporated portion of the
5 Ferndale UGA when it did not meet the criteria for transferring the land.
6

7 The County responds that the density assumptions to which Petitioner takes exception are
8 found in the revised Land Capacity Analysis (LCA) which is not a part of the Comprehensive
9 Plan. Therefore, the County argues if there is an inconsistency it does not exist within the
10 Plan. The Board agrees. The internal consistency requirement of RCW 36.70A.070
11 (preamble) means that the goals and policies *within* the County’s Comprehensive Plan be
12 compatible with each other; that is one goal or policy may not thwart another. It also means
13 that the Future Land Use Map (Whatcom County’s Comprehensive Plan Designation Map,
14 Map #8) is consistent with the elements of the Comprehensive Plan. This provision of the
15 GMA does not establish a requirement for development regulations to be consistent with
16 the comprehensive plan; that requirement is found in RCW 36.70A.040.¹²² RCW
17 36.70A.040(3) requires that development regulations be consistent with and implement the
18 comprehensive plan. The Board notes that Stalheim contends the Zoning Map, which is a
19 development regulation, must be consistent with the Comprehensive Plan. While this is a
20 true statement, this requirement comes from RCW 36.70A.040 and not RCW 36.70A.070’s
21 Preamble.
22
23
24

25 Thus, Stalheim’s contention that the Zoning Map, a development regulation, must be
26 consistent with the Comprehensive Plan is not supported by 36.70A.070, which is the only
27 GMA provision asserted violated by the Petitioner.
28
29
30

31 _____
32 ¹²¹ Id.

¹²² RCW 36.70A.040(3) requires that development regulations be consistent with and implement the
comprehensive plan.

1 The City of Ferndale adopted and incorporated by reference Whatcom County's arguments
2 on this issue.¹²³

3
4 Anchor Manor notes in reply that Goal 2P states in part:" . . . Encourage remaining smaller
5 cities and unincorporated residential/recreational urban growth areas, not associated with a
6 city to establish new residential development and average densities of 4 dwelling units per
7 residential acre . . . ". Anchor Manor points out that the zoning for its project is UR-4 which
8 allows a maximum gross density of 4 dwelling units per acre but requires a minimum net
9 density of 4 dwelling units per acre and that, thus, the development regulations for its
10 project are consistent with Goal 2P of the Comprehensive Plan.¹²⁴

11
12 With regard to Policy 2P-1 and the need for mechanisms to ensure desired densities are
13 achieved, the Board notes that Finding 37 specifically found:

14
15
16 The City of Ferndale has initiated several incentive-based sprawl reducing
17 measures: increased height limits and reduced setbacks within multi-family
18 zones, minimum residential densities within downtown zones, reduced water and
19 sewer connection fees for dense developments and infill projects, the
20 establishment of a cottage housing ordinance, expansion of mixed use
21 commercial zones, incentives for commercial developments which incorporate
22 residential elements.

23 Not only is it true that the City of Ferndale's Comprehensive Plan and development
24 regulations are clearly not the subject of this appeal, Petitioners have not demonstrated
25 any internal inconsistency within the County's Comprehensive Plan.

26 Stalheim contends the transference of the Vista Malloy area into the unincorporated portion
27 of the Ferndale UGA from the UGA Reserve is inconsistent with the County's criteria for
28 such transference. Specifically, Stalheim asserts this action was inconsistent with Criteria 1,
29
30

31
32 ¹²³ Ferndale Brief, at 29.

¹²⁴ Anchor Manor Brief at 10.

1 Need for Land Capacity; Criteria 2, Adequate Public Facilities and Services; and Criteria 3,
2 Land Use Plans.¹²⁵

3
4 In response, the County contends this area was “restored” to the Ferndale UGA based on a
5 repeal of prior legislation, something that is well within the power of the current County
6 Council.¹²⁶

7
8 The Board does not discount the County’s statement that the current County Council may
9 repeal legislation enacted by a prior Council. However, the County misses the point of
10 Stalheim’s argument in that the Comprehensive Plan has outlined criteria that are to be met
11 prior to effectuating a transfer of land from a UGA Reserve to a UGA.

12
13 As the Board notes elsewhere in this order, the County erred in its analysis of the land
14 needed for the Ferndale UGA by utilizing both a market factor and a consideration of “local
15 circumstances”. It further erred in approving the Ferndale UGA without current fire and
16 sewer capital facilities in place. Consequently, the County’s actions created an
17 inconsistency between its UGA Reserve Criteria and its Comprehensive Plan map.

18
19
20 **Conclusion:** The Board concludes that Petitioners have carried their burden of proof in
21 demonstrating Whatcom County’s action in adopting Ordinance No. 2010-037 violated RCW
22 36.70A.070 (preamble) due to an inconsistency with its UGA Reserve Criteria 2, “Adequate
23 Public Facilities and Services.”

24 25 I. Inter-jurisdictional Cooperation

26 **Stalheim Issue 6** Did the County’s amendment of the official zoning map and the
27 comprehensive plan text and map in Ord. No. 2010-037 fail to comply with the requirements
28 of RCW 36.70A.100 because the plan was not coordinated with the comprehensive plans
29 adopted by cities that have, in part, common borders or related regional issues as required
30 by RCW 36.70A.100?

31
32 ¹²⁵ Stalheim Opening Brief, at 17-18

¹²⁶ County Brief, at 22.

1 Applicable Law

2 RCW 36.70A.100 provides:

3 The comprehensive plan of each county or city that is adopted pursuant to RCW
4 36.70A.040 shall be coordinated with, and consistent with, the comprehensive
5 plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which
6 the county or city has, in part, common borders or related regional issues.

7 Board Analysis and Findings

8 RCW 36.70A.100 requires coordination among the comprehensive plans of jurisdictions.¹²⁷
9 Stalheim argues that Map UGA-4 and Map 8 were amended to include an Urban Growth
10 Area Reserve (the Slater/I-5 interchange) that touches or abuts the Bellingham UGA and
11 that this common border meets the requirement for a plan that must be coordinated with and
12 consistent with the Bellingham UGA.¹²⁸ Stalheim argues that the County has not produced
13 evidence in the record of any attempt at coordination with the City of Bellingham for the
14 expansion of the UGA Reserve that immediately abuts the Bellingham UGA and that the
15 City was not provided with any specific notice of the proposed amendment asking for its
16 comments to ensure that the plan was coordinated and consistent with Bellingham's plan for
17 this interchange area with I-5.¹²⁹ However, under an RCW 36.70A.100 challenge, the
18 burden is on Stalheim to identify not only the provisions in Whatcom County's
19 Comprehensive Plan at issue but explain how it is uncoordinated or inconsistent with
20 provisions in the City of Bellingham's Comprehensive Plan.¹³⁰ Stalheim's fatal flaw is that
21 he has failed to make a plan-to-plan comparison and cites no goal, no policy, no map of
22 Bellingham's Comprehensive Plan that conflicts with either Map UGA-4 or Map 8.
23
24
25
26
27
28

29 ¹²⁷ Stalheim also raises RCW 36.70A.010 and 36.70A.020(11) and WAC 365-196-520 to support this issue.
30 These RCW and WAC provisions are not contained in the issue statement and, therefore, pursuant to RCW
31 36.70A.290(1), the Board will not address them.

32 ¹²⁸ Stalheim Opening Brief at 18.

¹²⁹ Stalheim Opening Brief at 19.

¹³⁰ See e.g., *Hensley v. Woodinville*, CPSGMHB Case 96-3-0031, FDO at 13 (Feb. 25, 1997); *SOS v. Kent*,
CPSGMHB Case 04-3-0011, FDO at 4 (Dec 4, 2004).

1 Instead, the foundation of Stalheim's argument is that "coordinated with", as that term is
2 used in RCW 36.70A.100, equates to "consultation". Stalheim contends Bellingham was
3 not provided with any specific notice of the proposed amendment asking for its comments
4 so as to ensure that the County's plan was coordinated and consistent with Bellingham's
5 plan for area.¹³¹ Although the Board does not read RCW 36.70A.100's "coordinated with" as
6 an expressed synonym for consultation,¹³² the County's 10-year review of UGAs, resulting
7 in the adoption of Ordinance 2009-071, did include extensive inter-jurisdictional planning
8 between the county and all cities, including Bellingham, and Ordinance 2010-037 is a
9 continuation of that process.¹³³ In addition, as to the amendments currently under challenge
10 in these proceedings, Bellingham was made aware of those proposed amendments, was
11 specifically asked to submit comments, and participated in settlement and council
12 meetings.¹³⁴
13
14

15 As Stalheim concedes, "The County undertook a ten-year review of UGAs, culminating in
16 the adoption of Ordinance 2009-071, [that] included extensive coordination between the
17 county and all cities."¹³⁵ Ex. C-509 and Ex. C-510¹³⁶ provide the very notice to Bellingham,
18 and representatives of other cities, that Stalheim claims is lacking.
19
20

21 The County points out that not only was Bellingham given actual notice but it was placed on
22 notice earlier in the process that Ferndale was seeking this area not just as a UGA Reserve,
23 but part of its UGA.¹³⁷ Also, the County notes that prior to the adoption of Ordinance
24
25

26 ¹³¹ Stalheim Opening Brief, at 19.

27 ¹³² See e.g. *KAP v. Redmond*, CPSGMHB 06-3-0026, FDO at 11 (April 5, 2007); *SOS v. Kent*, CPSGMHB 04-
28 3-0019, FDO at 9 (Dec. 16, 2004).

29 ¹³³ Exhibits C-79, C-85, and C-96 (Growth Management Coordinating Council Minutes).

30 ¹³⁴ Exhibit C-509 (E-mail from Whatcom County Planning Director); Exhibit C-510 (Email from Whatcom
31 County Planning to City Planners requesting comments); C-334 (July 13, 2010 County Council Minutes –
32 Bellingham Mayor Pike); C-511 (April 12, 2010 County Council Special Committee Minutes – Bellingham
Planning Director Tim Stewart); C-512 (April 13, 2010 County Council Minutes).

¹³⁵ Stalheim Opening Brief at 19.

¹³⁶ Exhibits C-509 and C-510 were added to the record by the Board's February 17, 2001 Order on Motion to
Supplement.

¹³⁷ County Brief at 23.

1 number 2009–071 Ferndale discussed this UGA with representatives from Bellingham and,
2 following its adoption, Bellingham's mayor participated in a settlement conference where
3 Ferndale once again explained its proposal.¹³⁸ Thus, the Board finds that the City of
4 Bellingham was on notice of the proposal over a year prior to the adoption of Ordinance
5 2010–037 and the County did not fail to coordinate its adoption with cities.
6

7 **Conclusion:** The Board concludes that Petitioners have failed to carry their burden of proof
8 in demonstrating the County's action in the adoption Ordinance No. 2010-37 violated RCW
9 36.70A.100.
10

11 **J. Mitigation and Cleansing of Discharges**

12 **Stalheim Issue 7** Did the County's amendment of the official zoning map and the
13 comprehensive plan text and map in Ord. No. 2010-037 fail to comply with RCW
14 36.70A.060¹³⁹ and 36.70A.070(1) and (3) because the County expanded the Ferndale and
15 Birch Bay UGAs without adequately designating and protecting critical areas and without
16 amending the land use element as necessary to provide corrective actions to mitigate or
17 cleanse discharges from the expanded UGA areas that pollute waters of the state, including
18 Puget Sound and also affected watersheds?

19 Applicable Law

20 RCW 36.70A.070 (1) and (3) provide:

21 Each comprehensive plan shall include a plan, scheme, or design for each of
22 the following:

23 (1) A land use element designating the proposed general distribution and
24 general location and extent of the uses of land, where appropriate, for
25 agriculture, timber production, housing, commerce, industry, recreation, open
26 spaces, general aviation airports, public utilities, public facilities, and other
27 land uses. The land use element shall include population densities, building
28 intensities, and estimates of future population growth. The land use element
29 shall provide for protection of the quality and quantity of groundwater used for
30 public water supplies. Wherever possible, the land use element should
31 consider utilizing urban planning approaches that promote physical activity.
32

¹³⁸ Id.

¹³⁹ The Board has previously dismissed that portion of this issue that alleges a violation of RCW 36.70A.060

1 **Where applicable, the land use element shall review drainage, flooding,**
2 **and storm water run-off in the area and nearby jurisdictions and provide**
3 **guidance for corrective actions to mitigate or cleanse those discharges**
4 **that pollute waters of the state, including Puget Sound or waters**
5 **entering Puget Sound. (emphasis supplied)**

6 * * *

7 (3) A capital facilities plan element consisting of: (a) An inventory of
8 existing capital facilities owned by public entities, showing the locations and
9 capacities of the capital facilities; (b) a forecast of the future needs for such
10 capital facilities; (c) the proposed locations and capacities of expanded or new
11 capital facilities; (d) at least a six-year plan that will finance such capital
12 facilities within projected funding capacities and clearly identifies sources of
13 public money for such purposes; and (e) a requirement to reassess the land
14 use element if probable funding falls short of meeting existing needs and to
15 ensure that the land use element, capital facilities plan element, and financing
16 plan within the capital facilities plan element are coordinated and consistent.
17 Park and recreation facilities shall be included in the capital facilities plan
18 element.

19 *Board Analysis and Findings*

20 Stalheim notes that the UGAs for both Birch Bay and Ferndale expanded further into the
21 Drayton Harbor and Birch Bay watersheds, watersheds that are designated as
22 Shellfish Protection Districts (SPD) – the Drayton Harbor Watershed and the Birch Bay
23 Watershed.¹⁴⁰ Stalheim points out that the Birch Bay Watershed Characterization Plan
24 recommended specific management tools to achieve goals to protect these areas.¹⁴¹
25 Nevertheless, Stalheim contends the County placed more intensive development into the
26 Birch Bay watershed and, by so doing, failed to take necessary corrective actions to
27 “mitigate and cleanse discharges” from the expanded UGA, as required by RCW 36.70
28 A.070.¹⁴²

29 Stalheim makes similar assertions as to the Drayton Harbor watershed and argues that the
30 County, in authorizing the UGA expansion, did nothing to ensure that the urbanization of the

31

¹⁴⁰ Stalheim Opening Brief at 21.

32 ¹⁴¹ Id. at 22.

¹⁴² Id.

1 watershed would not further exacerbate pollution of the waters of the State, including Puget
2 Sound.¹⁴³ For both of these watersheds, Stalheim submits evidence as to pollutant
3 discharges that impact water quality.¹⁴⁴ (citing Birch Bay Watershed Characterization
4 (Exhibit A-8), Drayton Harbor Watershed Fecal Coliform TMDL (Exhibit A-6), California
5 Creek Fecal Coliform Study (Exhibit A-7)). Stalheim further cites WAC procedural criteria
6 and Whatcom County CPPs to support this issue.¹⁴⁵
7

8 In response the County points out that the Board does not have authority to review the
9 entire comprehensive plan when UGAs are reviewed every 10 years in accordance with
10 RCW 36.70A.130(3), but instead may review only whether the requirements of the statute
11 are met.¹⁴⁶
12

13 In addressing this issue, Ferndale points out that Petitioners have not challenged
14 Ferndale's land use element or capital facilities planning with regard to this issue but, like
15 the County, it has implemented measures providing for corrective actions to mitigate or
16 cleanse discharges that pollute waters of the State, including Puget Sound.¹⁴⁷
17
18

19 Anchor Manor also addresses this issue, and states the Birch Bay Watershed
20 Characterization and Watershed Planning Pilot Study is simply a guidance document
21 which recommends that the County take certain measures for dealing with stormwater so
22 that the water quality of Birch Bay and its tributaries will be maintained.¹⁴⁸ It notes these
23 recommendations have not been adopted by Whatcom County, nor are they incorporated
24 in any development regulations.¹⁴⁹
25
26
27
28

29 ¹⁴³ Id. at 23.

30 ¹⁴⁴ Id. at 21-24.

31 ¹⁴⁵ Id. at 24-25.

32 ¹⁴⁶ County Brief at 24.

¹⁴⁷ Ferndale Brief at 29.

¹⁴⁸ Anchor Manor Brief at 11.

¹⁴⁹ Id.

1 In response, Stalheim contends the *Adams Cove* case cited by Whatcom County is a
2 misguided interpretation and contrary to the current WAC provisions related to UGA
3 expansion and critical areas and the CPPs.¹⁵⁰
4

5 Stalheim essentially contends that the County, with the expansion of the two UGAs, has
6 failed to amend its Land Use Element to provide guidance for corrective actions as provided
7 in RCW 36.70A.070(1). This necessitates an analysis of the Board's scope of review in
8 these proceedings. The Board notes that the portion of the GMA alleged to have been
9 violated relates to the requirements of a mandatory land use element, as a component of
10 the comprehensive plan. The scope of Board review does not extend to whether the
11 County's land use element (not amended by Ordinance 2010-037), meets this requirement.
12 Nor does anything in RCW 36.70A.130(3) indicate that it is triggered by review and
13 adjustment of UGA boundaries. As the County correctly points out, a collateral attack on
14 previously adopted substantive plan components is untimely. See, *City of Bothell, et al. v.*
15 *Snohomish County*, CPSGMHB, No. 07-3-0026c (FDO, 9/17/07).
16
17

18 The Board has specifically addressed the issue of whether this provision of RCW
19 36.70A.070 may be raised in response to a revision of a UGA. In *Adams Cove Group and*
20 *Futurewise v. Thurston County*, WWGMHB No. 07-2-0005, FDO (7/28/08), this Board
21 dismissed the issue and stated:
22

23 Without identifying any particular portion of the land use element, Futurewise
24 asserts that the land use element of the Yelm Comprehensive Plan update 'fails
25 to provide the necessary guidance corrective actions to mitigate or cleanse
26 discharges that pollute waters of the State, including Puget Sound' in violation of
27 the GMA. As argued with Issue 1 Futurewise asserts the size of Yelm's UGA
28 causes pollution of Puget Sound's waters. While RCW 36.70A .070(1) does, in
29 fact, require such guidance, that requirement does not arise in the context of
30 sizing UGAs.
31

32 ¹⁵⁰ Stalheim Reply Brief at 13-14. The Board notes that Stalheim Issue 7 does not allege a violation of WAC provisions or Comprehensive Plan Policies (CPPs).

1 While *Adams Cove* is distinguishable based on the nature of Futurewise's challenge in
2 that case, which focused on the size of the Yelm UGA, the same result is appropriate
3 here. Where the County's land use element is not before the Board Petitioners may not
4 raise allegations that it fails to contain those provisions required in RCW 36.70A.070(1).
5

6 **Conclusion:** The Board concludes that Petitioners have failed to carry their burden of proof
7 in demonstrating the County's action in the adoption of Ordinance No. 2010-037 violated
8 RCW 36.70A.070(1) as the County's Land Use Element has not been amended and is not
9 before the Board in this proceeding.
10

11 **K. Public Participation**

12 **Martin Issue 7:** Did the County adoption of the comprehensive plan amendment and
13 development regulations fail to comply with the requirements of RCW 36.70A.140 because
14 it did not provide for early and continuous public participation?¹⁵¹
15

16 **Stalheim Issue 9:** Did the County's amendment of the official zoning map and the
17 comprehensive plan text and map in Ord. No. 2010-037 fail to comply with the requirements
18 of RCW 36.70A.140 because the County did not provide for early and continuous public
19 participation, including providing a public participation strategy?

20 Applicable Law

21 RCW 36.70A.140 provides:

22 Each county and city that is required or chooses to plan under RCW 36.70A.040
23 shall establish and broadly disseminate to the public a public participation
24 program identifying procedures providing for early and continuous public
25 participation in the development and amendment of comprehensive land use
26 plans and development regulations implementing such plans. The procedures
27 shall provide for broad dissemination of proposals and alternatives, opportunity
28 for written comments, public meetings after effective notice, provision for open
29 discussion, communication programs, information services, and consideration of
30 and response to public comments. In enacting legislation in response to the
31 board's decision pursuant to RCW 36.70A.300 declaring part or all of a
32 comprehensive plan or development regulation invalid, the county or city shall

¹⁵¹ On this issue, Martin incorporates by reference the briefing Stalheim submitted on his Issue 9. Martin's Opening Brief at 27.

1 provide for public participation that is appropriate and effective under the
2 circumstances presented by the board's order. Errors in exact compliance with
3 the established program and procedures shall not render the comprehensive
4 land use plan or development regulations invalid if the spirit of the program and
5 procedures is observed.

6 Board Analysis and Findings

7 As is evident, RCW 36.70A.140 requires Whatcom County to adopt a public participation
8 program (PPP). The challenge raised by the Petitioners was not based on the County's
9 failure to establish such a program, as Stalheim concedes this has been done.¹⁵² Nor did
10 they challenge the adequacy of the procedures contained within the PPP.¹⁵³ Rather, the
11 challenge raised alleges that the County failed to follow its adopted PPP.
12

13 The County adopted a Public Participation Program (PPP) in May 2010 in response to
14 appeals of its 2009 UGA update and review process. The PPP included a provision to
15 review and revise the plan "should additional public participation activities need to occur" in
16 response to PFRs filed challenging the 2009 update.¹⁵⁴ Stalheim asserts that the County
17 never amended the PPP to include a specific public participation process to be followed for
18 Ordinance 2010-037, and instead held one cursory public hearing with no provision for
19 keeping the record open.¹⁵⁵ Further, Stalheim alleges that following the public hearing, the
20 County accepted correspondence from a select few individuals, making deals behind the
21 scenes.¹⁵⁶
22
23

24 In response, the County argues that the adoption of Ordinance 2010-037 must be seen as
25 part of the process that began with the 2009 update process and that this process included
26 numerous GMCC meetings, Planning Commission meetings, Council meetings and various
27
28

29 ¹⁵² Stalheim Opening Brief, at 26 (Noting that the County has an adopted PPP - Exhibit A-18, Public
30 Participation Plan – Growth Management Periodic Review).

31 ¹⁵³ Given the fact that the cited PPP was adopted in May 2010, a challenge to its provisions would have been
32 untimely.

¹⁵⁴ Public Participation Plan at 2.4.

¹⁵⁵ Stalheim Opening Brief at 26-27.

¹⁵⁶ Id. at 27.

1 public meetings that have been documented in the Public Participation Activities
2 Summary¹⁵⁷ and in Findings 18-39 to Ordinance 2009-071. After the petitions challenging
3 that ordinance were filed with the Board, the Council agreed to reconsider some of those
4 requests presented in the process leading up to the adoption of the first ordinance. The
5 record reflects that the Whatcom County Council Special Committee of the Whole held a
6 settlement conference on April 12, 2010 that included petitioners and Intervenor and
7 members of the public.¹⁵⁸ After this meeting the matter was discussed at several different
8 public meetings and a public hearing was scheduled.¹⁵⁹

10 Exhibit C-334 demonstrates that the County Council conducted a public hearing on the
11 ordinance and public testimony was offered.

13 In response to Stalheim's allegation that only a select few were permitted to comment
14 following the public hearing, the County points out that the record demonstrates that the
15 comments referred to were mainly from the City of Ferndale and pertain to the supporting
16 findings rather than the substance of the ordinance.¹⁶⁰ The County acknowledges Anchor
17 Manor made a written submission, but states there is no evidence that the Council rejected
18 any submissions and in fact several members of the public made comments and written
19 comment was accepted by the Council on the ordinance in open session on July 7, 2010
20 and August 10, 2010. The Board finds that Petitioners have failed to establish that such
21 conduct is a violation of the provisions of RCW 36.70A.140.

23 Finally, with regard to Petitioner's argument that the County has violated its own PPP the
24 County points out that this is the plan for the seven-year update and the plan pertaining to
25 the UGA process was within the scope of this process. It is notable that the section of the
26 PPP that Stalheim relies upon, Section 2-4 provides that "Should some **additional** public
27
28
29

30
31 ¹⁵⁷ Ex. P-284 to County Brief.

32 ¹⁵⁸ County Exhibit C-511.

¹⁵⁹ County Exhibit C-334.

¹⁶⁰ County Exhibits C-512, C-290 and C-383.

1 participation activities need to occur associated with one or more of these petitions . . . ”
2 (emphasis added) the PPP would be reviewed and revised. This language suggests that the
3 PPP would be amended only if the County elected to go beyond the normally established
4 public participation process associated with bringing an ordinance to the County Council.
5 That the PPP was not amended does not establish a violation of the County’s own PPP or
6 RCW 36.70A.140.
7

8 The Board has long held that the GMA is founded on public participation. But, as the
9 County noted, the adoption of Ordinance 2010-037 must be seen as part of the process that
10 began with the 2009 update process and this process included numerous GMCC meetings,
11 Planning Commission meetings, County Council meetings, and various other public
12 meetings as documented in the Public Participation Activities Summary and Findings Nos.
13 18 to 39 of Ordinance 2009-071.¹⁶¹ Due to appeals filed in regards to the 2009 Ordinance,
14 the Whatcom County Council Special Committee of the Whole held a settlement conference
15 on April 12, 2010, which included all of the Petitioners, the Intervenors, and members of the
16 public.¹⁶² After this meeting, the matter was discussed at several different public meetings
17 and a public hearing was conducted where extensive public testimony was offered.¹⁶³
18 Thus, the Record shows ample opportunities for the petitioners to observe the adoption
19 process, to participate, to be informed, and to comment.
20
21
22

23 In light of the entire Record, the Board finds the County’s adoption process was not a clearly
24 erroneous violation of RCW 36.70A.140.
25
26
27
28

29 ¹⁶¹ County Brief – Exhibit P-213 Planning Commission Record; Exhibit C-260 County Council Meeting; Exhibit
30 P-284 Public Participation Activities Summary; Exhibit C-259 Ordinance 2009-071.

31 ¹⁶² County Brief - Exhibit C-511 Special Committee of the Whole; C-305 Settlement Conference Discussions;
32 Exhibit C-311 Settlement Conference Discussions.

¹⁶³ County Brief - Exhibit C-334 May 2010 Special Committee of the Whole Meeting; Exhibit C-512 April 2010
County Council Meeting; April 2010 Special Committee of the Whole Meeting; Exhibit C-383 August 2010
County Council Meeting.

1 **Conclusion:** The Board concludes that Petitioners have failed to carry their burden of proof
2 in demonstrating the County's action in adoption of Ordinance No. 2010-037 violated RCW
3 36.70A.140.

4
5 **L. Capital Facilities Plan**

6 **Stalheim Issue 10** Did the County's amendment of the official zoning map and the
7 comprehensive plan text and map in Ord. No. 2010-037 fail to comply with the requirements
8 of RCW 36.70A.070(preamble), (3) and (6) because the County did not amend its capital
9 facilities plan element as necessary to support the Ferndale and Birch Bay UGA expansions
10 and failed to ensure internal consistency between the map designations and capital facilities
11 plan element?

12 The Board finds Stalheim presented no briefing as to RCW 36.70A.070(6); therefore as
13 provided in WAC 242-02-570(1), this aspect of Stalheim Issue 10 is deemed abandoned.

14
15 Applicable Law

16 RCW 36.70.070 provides, in relevant part:

17 The comprehensive plan ... shall be an internally consistent document and all
18 elements shall be consistent with the future land use map. ...

19 Each comprehensive plan shall include a plan, scheme, or design for each of
20 the following:

21 * * *

22 (3) A capital facilities plan element consisting of: (a) An inventory of existing
23 capital facilities owned by public entities, showing the locations and capacities of
24 the capital facilities; (b) a forecast of the future needs for such capital facilities; (c)
25 the proposed locations and capacities of expanded or new capital facilities; (d) at
26 least a six-year plan that will finance such capital facilities within projected funding
27 capacities and clearly identifies sources of public money for such purposes; and
28 (e) a requirement to reassess the land use element if probable funding falls short
29 of meeting existing needs and to ensure that the land use element, capital
30 facilities plan element, and financing plan within the capital facilities plan element
31 are coordinated and consistent. Park and recreation facilities shall be included in
32 the capital facilities plan element.

31 Board Analysis and Findings

1 Stalheim argues that the County expanded UGAs without any updated or adequate
2 inventory, estimates of current and future needs or adoption of methodologies defining such
3 needs for infrastructure thus failing to comply with the GMA.¹⁶⁴
4

5 The County responds that in its initial ten-year UGA review the County Council adopted
6 Policy 2C – 5 to address public facilities and service gaps identified in the UGA review
7 process.¹⁶⁵ That policy states that the County will address any gaps or inconsistencies as
8 part of its 7 year review. Accordingly on November 17, 2010 the County applied to amend
9 its comprehensive plan, specifically Chapter 4 (Capital Facilities), Appendix E (Whatcom
10 county twenty-year Facilities plan) and Chapter 2 (Land Use) in light of the need to amend
11 as a result of the UGA expansions under Ord. 2010 – 037. Thus the County argues that
12 any deficiencies will be addressed during the reconciliation process.
13
14

15 As noted above, the Board concludes that in approving the Ferndale UGA expansion in the
16 absence of adequate capital facilities plans for fire and wastewater, the County violated
17 RCW 36.70A.110(3) by failing to encourage development first in urban areas where
18 adequate public facilities and services exist or can be provided in an efficient manner. In
19 light of that conclusion, it follows that the County likewise failed to comply with the
20 provisions of RCW 36.70A.070(3) which sets forth the necessary elements of a capital
21 facilities plan. As the County points out, its recent application to amend Chapter 4 of its
22 comprehensive plan (Capital Facilities), Appendix E (Whatcom County 20-year capital
23 facilities plan) and Chapter 2 (Land Use) (those portions that relate to capital facilities)
24 “reflects the need to amend as a result of the UGA expansions under Ord. 2010 – 037”.
25 Thus until such time as those amendments are made, the Board concludes that the County
26 has violated RCW 36.70A.070(3).
27
28
29
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¹⁶⁴ Stalheim Opening Brief at 28.

¹⁶⁵ County Brief at 28.

1 **Conclusion:** The Board concludes that Petitioners have carried their burden in
2 demonstrating Whatcom County's action in the adoption of Ordinance No. 2010-037
3 violated RCW 36.70A.070 (3).
4

5 **M. Request for Finding of Invalidity**

6 This Board has previously held that it will declare invalid only the most egregious
7 noncompliant provisions which threaten the local government's future ability to achieve
8 compliance with the Act.¹⁶⁶ Although the Board finds areas of noncompliance with the
9 GMA, Petitioners have not met the standard for a declaration of invalidity.
10

11 **VII. ORDER**

12 Based on the foregoing, the Board determines that Whatcom County's adoption of
13 Ordinance No. 2010-037 fails to comply with the GMA. The ordinance is remanded to the
14 County to take the necessary action to achieve compliance as set forth in this Order within
15 120 days. The following schedule for compliance shall apply:
16
17

18 Compliance Due on identified areas of 19 noncompliance	August 8, 2011
20 Compliance Report/Statement of Actions Taken 21 to Comply and Index to Compliance Record	August 22, 2011
22 Objections to a Finding of Compliance	September 5, 2011
23 Response to Objections	September 15, 2011
24 Compliance Hearing – (Telephonic) 25 360 407-3780 pin 756008#	September 28, 2011 10:00 a.m.

26 So ORDERED this 11th day of April, 2011.

27 _____
James McNamara, Board Member

28 _____
William P. Roehl, Board Member

31 _____
32 ¹⁶⁶ Abenroth v. Skagit County, WWGMHB No. 97-2-0060, FDO (7/22/98).

Nina Carter, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).